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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Practice Court;

WITH THE

POINTS OF PLEADING AND PRACTICE

DECIDED IN THE COURTS OF

Common Pleas and Exchequer;

FROM

EASTER TERM, 1844, TO EASTER TERM, 1845.

BY ALFRED DOWLING,

SERJEANT AT LAW,

AND JOHN JAMES LOWNDES,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. II.

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A

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ERRATA.

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- 54, at the end of line 2, add "joinder in demurrer."
67, lines 6 and 11, for "declaration" read "plea."
236, marginal note, line 17, for "6000L." read "600L."
244, line 30, for "fiat" read "fact."
251, note (a), for "Term" read "Vacation."
432, marginal note, line 26, for "indorsee" read "indorser."
435, line 34, for "indorsee" read "indorser."
474, line 5, marginal note, for "r 66" read "c 66."

The binder is requested to cancel leaves 73 and 75, and to substitute those at the end of Part III.

COURT OF QUEEN'S BENCH.

Easter Term.

IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

1844.

SHOWLER *v.* STOAKES and Another.

Interlocutory judgment for want of a plea having been set aside with costs at the instance of one of two defendants, who appeared separately, in an action against both for use and occupation; payment of the costs to the other defendant, who gave a receipt in the action for himself and partner, was held insufficient; although there was nothing apparent on the face of the order to shew that it was made at the instance of one only of the defendants.

ERLE shewed cause against a rule which had been obtained herein for discharging a rule making a Judge's order a rule of Court. The circumstances of the case were these: The plaintiff had brought an action for use and occupation against the above named defendant Stoakes, and another party of the name of Yeomans, who were co-partners in business. The defendants had appeared in person, but not having pleaded to the action, the plaintiff signed judgment against them by default. An application was afterwards made to a Judge at Chambers to set aside the judgment for irregularity, on the ground that no rule to plead had been entered. It was sworn by the affidavits in opposition to the present motion, that this summons was taken out by an attorney on behalf of the defendant Yeomans only; but there was nothing apparent on the face of it to shew that such was the case. It was urged before the Judge, that a summons for time to plead having been taken out by Stoakes, the other defendant, the objection as to there being no rule to plead, must be waived. The learned Judge however made an order, in the terms of the rule, setting aside the judgment with costs, which were afterwards taxed at 3*l.* 6*s.* 8*d.* On the following day, the plaintiff paid that sum to the defendant Stoakes, who gave a receipt in the action for himself and partner. Subsequently, a demand was made by Yeomans'

attorney on the plaintiff for the amount of these costs, and on refusal, the Judge's order was made a rule of Court. The plaintiff then obtained the present rule, which, under these circumstances, it was submitted, the Court would discharge, as it was clear, that the payment had been made to the wrong party.

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T. W. Saunders in support of the rule. There was nothing in the order or summons to shew that the application was made on behalf of one defendant only; and in its effects it enured equally to the benefit of both. It must, consequently, be taken to have been at the instance of both; and if, in point of fact, it was at the instance of Yeomans only, the plaintiff should have had express notice to that effect. The Court will, therefore, consider that the order ought not to have been made a rule of Court, and consequently grant the present application.

COLERIDGE, J.—I do not see any reason to doubt the bona fides of the payment in question, or to infer that there was any design to defraud Yeomans' attorney of his costs. The sole question, it appears to me, is, whether the money was paid to the party who had the legal right to receive it; and looking at the whole circumstances of this case, I am of opinion that it was not. Until the defendants pleaded together, it could not be certain that they would do so. The application at Chambers being solely at the instance of one defendant, it cannot afterwards be treated as a joint application, simply because it enures to the benefit of both. It must have been solely at the instance of Yeomans, for if at that of Stoakes also, the objection that he had waived the irregularity, by taking out a summons for time to plead, must have prevailed. I therefore think that, in effect, this was an order to pay costs to Yeomans, though not in terms; the rule must, consequently, be discharged.

Rule discharged.

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BANFIELD v. DARELL.

The Court granted a *distringas* to compel an appearance, where on application, on two occasions, at the residence of the defendant, who was a lunatic, the deponent was informed that he could neither see the defendant nor the keeper; the deponent, on the last occasion, having explained the purpose of his visit, and left a copy of the writ with the servant.

LUSH applied for a *distringas* to compel an appearance in the above cause. The affidavit stated, that defendant resides at his father's house, situate at, &c., and being of unsound mind, as deponent has been informed and verily believes, the defendant is under the care of a keeper named Blackman, and that without his consent or the consent of the other inmates of the said house, no one is permitted to see the defendant; that deponent went to the residence of defendant to serve defendant with a copy of the writ of summons, when and where deponent saw a footman of the defendant's family, who, in answer to deponent's inquiries, told him that the said Mr. Blackman could not be seen, and that no person was allowed to communicate with the defendant: that on another occasion he went to the defendant's residence again for the purpose aforesaid, and then and there saw the footman, who, in answer to deponent's inquiry, again said that neither the said Mr. Blackman, the defendant's father, nor the defendant himself could be seen, and that no one was allowed to communicate with him; whereupon deponent inquired if he could see the defendant on any other day, and at the same time deponent stated he had a copy of the said writ to serve on the defendant, and as deponent was again informed that no one was allowed to see or communicate with the defendant, he then left a copy of the writ with the footman.

PER CURIAM.—Take a rule.

Rule nisi. (a)

(a) The rule was afterwards made absolute.

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then due to the plaintiff as chorus master of and at the Drury Lane Theatre, hired as such by the defendant, and at his request ;” the second count, “for the salary of the plaintiff, then due and payable from the defendant to the plaintiff, for his services before then done and performed as a performer in and at the theatre, in the said first count mentioned, for the defendant, and at his like request ;” and the third count for money due on an account stated. The defendant had pleaded the general issue, except as to so much of the causes of action as related to the sum of 12*l.* 1*s.* 6*d.* ; and as to that sum, payment into Court. The plaintiff joined issue on the plea of non-assumpsit, and accepted the sum paid into Court. The particulars of demand attached to the declaration, were as follows :

		£	s.	d.
Arrears of Salary,	Oct. 5th, 1842	0	10	6
	12th, “	1	1	0
	Dec. 10th, “	0	10	6
	24th, “	1	1	0
	Feb. 11th, 1843	0	10	6
	25th, “	0	10	6
	March 5th, “	1	1	0
	11th, “	3	3	0
	18th, “	3	3	0
	Saturday, Monday, and Tuesday, 18th, 20th, and 21st March	1	11	6
Performances in Der Freischutz,	11th Feb. 1843	3	3	0
The like in Macbeth,	13th “	3	3	0
		<hr/> £19 8 6 <hr/>		

The plaintiff had obtained a Judge’s order to try before the sheriff of Middlesex, on which the defendant had indorsed his consent, and the cause was consequently tried before that officer on the 16th of April in the present Term, and a verdict found for the defendant. The present application which was made on behalf of the plaintiff, might

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COLERIDGE, J.—I do not think that this was an action for unliquidated damages; for if it were, then an action for work and labour, for goods sold and delivered, or on a promissory note, would be equally so. The particulars of demand do not shew it to be for unliquidated damages. The first claim, is for certain items of salary. It appeared that the plaintiff had been retained at a fixed salary, from which the officer of the theatre had thought proper to make certain deductions. The plaintiff denied his right to make these deductions and sued to recover them. This was in truth an action for the balance of the salary, he having been only paid in part, and could not be called an action for unliquidated damages. The second claim was in respect of a week's salary to which the plaintiff claimed to be entitled, for being dismissed without notice. It is for a certain sum, for the sum which he would have had for a week's work and labour, but to which he claims to be entitled, although no work or labour was in fact performed; it is therefore clearly not for unliquidated damages. The case of *Jacquot v. Boura* (a), which has been cited, is not exactly in point. There, the particulars of demand claimed 7*l.* 19*s.* for wages, &c., "and also such further sum, by way of damages, as the jury might think proper to give, for the wrongful dismissal of the plaintiff without notice." That was distinctly a claim for unliquidated damages; here, the claim is for "arrears of salary, March 18th, 3*l.* 3*s.*," which appears from the affidavit to be for a week's salary, consequent on a dismissal, where the terms were a week's salary, or a week's notice. The last claim was in respect of a performance of parts undertaken at a short notice. This was beyond his regular engagement, and as there was no contract, it was to recover such sum as his services were worth. Neither is this, therefore, a claim for unliquidated damages. There will, consequently, be no rule.

Rule refused.

(a) *Ubi supra*.

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Ex parte PHILIP VYVYAN ROBINSON.

MONTAGUE SMITH moved to re-admit an attorney, who had ceased to practise for nearly thirty-nine years. The affidavit, in support of the motion, disclosed that the applicant had been admitted, as an attorney, on the 1st of July, 1802, and had duly taken out his certificate for that and the following years, till in November, 1805, he suffered it to expire, in consequence of getting no practice, and being offered the situation of Paymaster in the British Army, which he had accordingly accepted. That in the year 1818, he had succeeded to an estate of inheritance in the county of Cornwall, and for the last seventeen years had discharged the duties of a county magistrate, a commissioner of taxes, a deputy lieutenant, a trustee of turnpikes, savings' bank, and other unpaid offices. In consequence, however, of his having been defrauded of large sums of money by a bankrupt trustee under the will of a relative, and having a large family to provide for, he had recently accepted the stewardship of the property of the Baroness Basset of Tehidy Park, in the said county of Cornwall; and he now made this application to be re-admitted, in order to qualify himself for preparing leases and doing other legal matters connected with the said stewardship. It was submitted, that although ordinarily the Court would not order an attorney, where so considerable a time had elapsed to be re-admitted, *Ex parte Frost* (a), *Ex parte Billings* (b), yet where, as in the present case, there was no presumption of want of experience, the applicant having performed the duties of a county magistrate for a considerable part of the time, the Court would grant the motion. [*Coleridge, J.*—I do not see how performing the ordinary duties of a magistrate can give him experience in drawing leases, the purpose for which

After a lapse of thirty-nine years, the Court refused to re-admit an attorney without examination, although for the last seventeen years he had been acting as a county magistrate.

(a) 1 Chit. 558, n.

(b) 5 Dowl. 395.

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he seeks to be admitted. You found the application on his fitness. There will, therefore, be no great harm in permitting him to be examined under a special order.] The notices are regular for this Term; but they will not be for the next. [*Coleridge, J.*—'That may be provided for by the order, which the Court will make.]

PER CURIAM.—The applicant is to be at liberty forthwith to give the usual notices of his intention to apply next Term, for a renewal of his certificate to practise as an attorney of this Court; and the examiners are directed to examine the applicant in the next Term.

Rule accordingly (*a*).

(*a*) In the following Term, Mr. Justice *Wightman* acted on the above case, in *Ex parte Bray*, which was an application to readmit an attorney, who had discontinued practice for twelve years, during which period he had been wholly engaged in the occupation of a farmer and grazier. His Lordship directed a rule to be drawn up, enabling him to give fresh notices for the next Term, and directing the examiners to examine him.

REGINA v. RICHARD ANDREWS.

The Court refused to bail a prisoner, who was charged on a coroner's inquest with murder, and against whom a bill for the same crime had been found by the grand jury; although his trial had been postponed in consequence of the absence of witnesses

for the prosecution; and it was alleged that, on the face of the depositions, as taken before the coroner, the charge of murder could not be sustained.

MILLER moved that the above named prisoner, now in Warwick gaol, charged on a coroner's inquest, and on an indictment found by the grand jury, with the murder of his child, should be admitted to bail. He made this application on the ground, that on the face of the depositions, it would appear that the charge of murder could not be sustained. The prisoner stood for trial at the last Warwick Assizes; but the trial was put off at the request of the prosecutor, on account of the absence of some of the witnesses. The prisoner had offered to consent, that their

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party to bail, who was charged on a coroner's inquest with murder, and against whom a bill of indictment for that crime had also been found by the grand jury. No instance of a similar application was mentioned, but the case of *Reg. v. Scaife and Wife (a)*, was relied on in support of the present motion, and also the practice which prevails of admitting parties to bail who are charged merely on a coroner's inquest. The case cited, however, is clearly distinguishable; as there the offence charged against the prisoners, who were husband and wife, was having coining materials in their possession: and the wife, against whom there did not appear to be any strong evidence, was admitted to bail; but with respect to the husband, the application was refused. The case of persons charged on coroner's inquests, is also distinguishable; for there the Court can see the whole evidence on the depositions before them, and so can judge of the probable guilt or innocence of the prisoner. This distinction is very clearly taken in Lord *Mohun's case (b)*, which is a case exactly in point. There it is said, "If a man be found guilty of murder by the coroner's inquest, we sometimes bail him, because the coroner proceeds upon depositions taken in writing which we may look into. Otherwise, if a man be found guilty of murder by a grand jury; because the Court cannot take notice of their evidence, which they, by their oath, are bound to conceal." That is not the only case on this subject, for I find a uniform current of authorities against this application. Thus, in *Bac. Abr.*, tit. "*Bail in Criminal Cases*," there is a case reported where the Court held they would not bail after a bill for murder found, although the act were plainly only manslaughter. In *Reg. v. Chapman (c)* and *Reg. v. Guttridge (d)*, the one a case of murder, and the other of rape, after true bills found, the Court refused to bail the parties. I may advert to the fact, that application was made in the present case to Mr. Baron

(a) *Ubi supra*.

(b) 1 Salk. 104.

(c) *Ubi supra*.(d) *Id*.

Gurney, and that learned Judge thought he could not with propriety grant the application; which is another authority against the present motion. The application must, therefore, be refused.

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Rule refused.

JACKSON v. SEAGER.

BALL had obtained a rule, calling upon one Thomas Myddleton Loveland, the attorney for the defendant in the above cause, to shew cause why a writ of attachment should not issue against him for his contempt in not attending as a witness in this cause, pursuant to a writ of subpoena. It appeared, from the affidavits in support of the motion, that notice that the cause, which was a feigned issue between the parties, would be tried at the sittings after Michaelmas Term, had been given to Messrs. Loveland and Beckett, who acted as attorneys for the defendant; that a subpoena duces tecum was sued out on the 1st of February, in the present year, directed to Mr. Loveland, to appear on the 3rd, at Westminster; that on the 2nd of February, about three o'clock in the afternoon, a call was made at the office of Messrs. Loveland and Beckett, in Symond's Inn, for the purpose of serving the former with a copy of the subpoena; that the deponent then saw the partner of Mr. Loveland, whom he informed of his business, and who said, "that if the deponent left the subpoena and conduct money with him, Mr. Loveland would attend;" that deponent having business elsewhere, and not being able to wait, left a person to watch for Mr. Loveland's return, who waited a considerable time, and called again at the office without success, and was told that Mr. Loveland would not return

The defendant's attorney in the above cause had been served by the plaintiff with a subpoena duces tecum, at Chelsea, just before 10 o'clock at night, to attend at Westminster next morning at 9 o'clock, to produce certain documents which were at his office in Symond's Inn. He was clerk to the board of guardians, and vestry clerk, and in his duty as such, attended that morning a meeting which had been previously fixed, believing that he would still be in time to attend the trial: but a special jury case, which it was expected would have lasted the

whole day, suddenly terminating, the above cause was called on about 10 o'clock in the morning, and the record, in consequence of his absence, withdrawn. The Court made a rule absolute for an attachment against him.

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that night. That the same evening, about half past eight, service was effected on Mr. Loveland at his residence at Chelsea, and payment of a shilling made. That on the 3rd of February, the cause was called on at about ten o'clock in the morning; but that in consequence of the absence of Mr. Loveland, who, it was sworn, was a necessary and material witness for the plaintiff, the plaintiff was obliged to withdraw the record. From the affidavits in opposition to the motion, it appeared that Mr. Loveland was served with the copy of the subpoena a few minutes before ten o'clock, just as he was going to bed, and that the subpoena was to appear the next morning at Westminster at nine o'clock; that he told the party serving him that he ought to receive a guinea with such copy subpoena, but the party serving refused to pay more than a shilling; that being clerk to the guardians, and vestry clerk to the parish of Chelsea, before knowing that the above cause would be in the paper for the 3rd of February, deponent made arrangements to attend the Board of Guardians in his official capacity; that he believed he would be able to discharge his duties as such clerk, &c., and afterwards reach Westminster Hall in time to be examined as a witness in the cause, which stood in the paper after a special jury, which his clerk had been informed, on inquiry at the Marshal's office, would most probably last the whole day; that he shortened his duties as such clerk, &c., as much as possible, and made every exertion to reach Westminster Hall early in the day, and accordingly did reach Westminster Hall by twelve o'clock, when he found the Court had risen; that he was not aware, till served with the subpoena, that his attendance would be required at the trial; and that the papers which he was required to produce, were at his office in Symond's Inn. The affidavits also disclosed circumstances tending to shew the record was not withdrawn in consequence solely of Mr. Loveland's absence; but on account of the absence of several other

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called on. The case of *Maunsell v. Ainsworth* (a), shews the question of reasonable time of service, depends on the facts of each particular case. There, service at twelve o'clock on the steps of the Court House, was deemed a good service for a cause called on at five o'clock the same day. The calls made at the office of Messrs. Loveland and Beckitt on the afternoon of the preceding day, shew that the plaintiff has not been guilty of laches.

WIGHTMAN, J.—I think this rule must be made absolute. As an attorney of this Court, Mr. Loveland must have been aware that it was his paramount duty to have attended here. He thought, however, he could first attend the Board of Guardians, and still be in time for the trial. In that expectation he was mistaken; but he ought to have known that he had no right to speculate on such a chance. The rule will, therefore, be absolute.

Rule absolute.

(a) 8 Dowl. 869.

HAY v. EARL OF CHARLEVILLE.

On inquiry at the town residence of the defendant, who was a peer of Ireland, it appeared that the defendant was staying in Ireland, at his usual place of residence there. Calls were made, and a copy of the writ of summons left at his town residence; and another copy, enclosed to his address in Ireland. The defendant had taken no notice of these proceedings. The Court refused to grant a *distringas*.

W. H. WATSON moved for a *distringas* to compel an appearance against the above named defendant. The affidavit in support of this motion stated, that deponent had called at the dwelling-house of the defendant, situate at No. 8, St. George's Place, Hyde Park, in the said county of Middlesex, three times, and made and kept two appointments, and had seen the servant and housekeeper, and informed them of the nature of his business, and had been told by them on one occasion, "that defendant was from home, and could not be seen,—that he was in Ireland, and that it was uncertain when he would return

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against an ordinary defendant, the plaintiff would be entitled to a distringas to outlawry, the Court, where the defendant is a peer, will grant a distringas to compel an appearance (a). Those cases go to the extreme limit, and I do not think it desirable they should be at all extended. Now, in the present case, there is nothing to shew that the defendant is keeping out of the way. He is a peer of Ireland, and it appears that he has a place of residence in that country, where he now is. It is said, that he should have answered the letters addressed to him, or have caused an appearance to be entered for him; but I do not think, that he was bound to do either of these things. It is also urged, that the plaintiff is without any other remedy against the defendant. But this is not so, as the plaintiff can proceed against him in the Courts of law in Ireland, where he resides, and has property. I, therefore, see no reason for making the present case an exception to the general rule; and, consequently, this application must be refused.

Writ refused.

(a) See *Davis v. Earl of Lichfield*, 1 Dowl. 363, N. S.; *Taylor v. Lord Stuart de Rothsay*, 2 Dowl. 121, N. S.; S. C. 5 Scott, N. R. 183; 4 M. & G. 388; *Houl-*

ditch v. Earl of Lichfield, 4 M. & G. 770; S. C. 5 Scott, N. R. 130; *Snape v. Earl Waldegrave*, ubi supra; *Bigge v. Earl of Tankerville*, ubi supra.

PHILPOT v. THOMPSON and Another.

On a motion to stay proceedings in an action on a judgment, on the ground that it had been signed against good faith, it appeared, that

PLATT and Peacock shewed cause against a rule which had been obtained, to stay all proceedings in the above action, as being commenced against good faith. The action was upon a judgment recovered by the above-named plaintiff against the above-named defendants, and it appeared similar affidavits had been previously used, and the same objection successfully urged, on a motion to set aside a writ of fieri facias issued on the same judgment. The Court granted a rule to stay proceedings in the action, but without costs, as the defendants ought to have included the judgment in their former motion.

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Court, having made it absolute, without stating the grounds on which he proceeded, may have proceeded on such as would not have operated against the judgment—that had that rule embraced the judgment as well as the writ, the learned Judge might have distinguished between the two—refused permission to the plaintiff to proceed summarily on the latter, but left the defendants to plead their defence to the former, and so bring the disputed facts before a jury. If I could see any ground for this, in fact, I should certainly adopt this course, but having the affidavits then used, before me now, I see that the only grounds then relied on, were a bonâ fide settlement of the action, under which the plaintiff had received some money, been excused from the payment of more, and also been discharged out of prison in an action in which he had suffered judgment by default. After this, he signed the judgment, on which the present action is founded, and sued out the writ then set aside. If it were wrong to do the latter, it was equally wrong to do the former—and though these matters make it inequitable to sign the judgment, yet as they occurred before the signing, they cannot be pleaded in discharge of it, or as an answer to it—so that my Brother *Williams* could not have made the distinction suggested; and if I were now to make it, the consequence must be, that the plaintiff would have judgment in the present action with no more trial of the merits than has already been had on affidavit, and when he sued out his writ of execution, one or other of these circumstances would follow, either the writ would be set aside, and so after much unnecessary expense and vexation, the same conclusion would be arrived at as the case has now reached; or it would not, and then the decision of the Court on the same facts would be reversed. I think I am bound to prevent either of these consequences, and to make this rule absolute, but without costs, because the defendants ought, in their former rule, to have included the judgment, and so prevented the possibility of the present proceedings.

Rule absolute, without costs.

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Mr. Carrick, at a time and place assigned, and to be examined under the commission, and to produce the writings mentioned in such commission, or such of them as were in his possession or power. It appeared from the affidavits that, by the law of Scotland, the examination of documents usually took place at a much earlier stage of the cause than in England; and that it was usual to grant a commission for the purpose, which was called a commission of havers. That, thereupon, in Scotland, a diligence issued, compelling the parties having them in possession, who are called "havers," to appear before the commissioners, and produce the documents, and answer such questions as might be proposed to them touching the same. The authority of the commissioners, and the practice in this respect, may be seen on referring to *Tait's Law of Evidence*, p. 181. [Coleridge, J.—Does the act of Parliament apply to a case like the present, where the commission is for the production of documents only?] It is submitted, that it does, inasmuch as it gives the Court the power, in case of refusal or failure to attend, to order "the attendance or examination of any person to be named, or the production of any writing or documents," &c. As the present application is in the nature of a subpoena, the Court will probably consider it should be a rule absolute in the first instance. [Coleridge, J.—No, the party may be prepared to deny the possession of the documents.

PER CURIAM.—

Rule nisi (a).

part of the kingdom within which such commission is to be executed, or any one of the Judges of such Courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid to appear before such commissioner or commissioners, and to be examined under such commission, and it shall be lawful for the Court or Judge to

whom such application shall be made by rule or order to command the attendance and examination of any person to be named or the production of any writings or documents to be mentioned in such rule or order."

(a) The rule was, on a subsequent day, made absolute by consent.

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him the sum of 1*s.*; and on the following day tendered him 1*l.* for his expenses, which he refused to receive, saying he would pay his own expenses. The place of his residence was eighteen miles distant from Norwich; and the place where the tender of 1*l.* for his expenses was made, was twenty-six miles distant from Norwich. The affidavit of plaintiff's attorney in support of the rule, stated, that on the cause being called on for trial, "deponent caused the said John Devereux to be called, upon his subpoena, in due form, by an officer of the Court, but that the said John Devereux did not appear, neither was he in attendance upon his said subpoena, whereupon the deponent was under the necessity of withdrawing the writ of trial in this cause, and the same was not executed, nor the cause tried," &c. It was also sworn, that he was a material and necessary witness on the part of the plaintiff, who was unable to proceed to trial without his evidence; and that he had admitted that he had served a certain notice, the service of which he was subpoenaed to prove on the part of the above-named plaintiff. There was an affidavit by Devereux, to the effect, that being in the employment of a Mr. Dawson, a malster, he had, at the time in question, strict orders to watch by day and by night, a quantity of green malt. That he could not leave it at the time without considerable risk of its being damaged, and that if it had been, a pecuniary loss of a large amount would have been sustained by his master. That he told the party serving the subpoena that he could not attend for these reasons, unless the permission of his master could be obtained. It appeared that the master being from home, the permission of the managing clerk had been obtained, but that he did not consider that sufficient. He also stated his belief to be, that he could not have given any material evidence in the cause, and that the sole design of the plaintiff in subpoenaing him was to harass and annoy him.

Palmer shewed cause. It should distinctly appear on a

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F. Robinson, in support of the rule. As to the objection that the witness was not called in Court on his subpoena, *Malcolm v. Ray* (a) is no longer an authority on the subject. In the case of *Dixon v. Lee* (b), Mr. Baron Parke says, "If that case is not overruled, it has been so much shaken that it can scarcely be cited again as an authority." [*Wightman, J.*—In that case the objection was, the witness was not called on his subpoena; here the objection is, that he was not called in Court. Is it necessary he should be called in Court?] The foundation of this proceeding is his contempt in not answering when called on. If, therefore, it appears that he is absent at such a distance, that he could not answer, if called on, the act of calling becomes an useless ceremony; and to this effect Mr. Baron Alderson expresses himself in the case of *Dixon v. Lee*, where he says, "calling out the name of a party who is not in attendance would be perfectly useless." (c) In one report of *Dixon v. Lee* (d), it does not appear that the witness was called three times in Court. In the present case the statement is, that he was called "in due form;" and the Court will intend that expression to include, that he was called in the only place in which the calling would be legal and according to form. But if not, it is submitted, that the calling in Court is unnecessary. In *Lush's Practice*, p. 464, it is laid down, that the calling in Court is only to satisfy the Court that the witness is not there present. If, therefore, the Court is satisfied that the party was not there to answer, if he had been called, and this from the defendant's own shewing, the calling is a mere superfluous ceremony. In *Rex v. Stretch* (e), Mr. Justice Patteson says, "If you fix a witness with the fact of absence, I cannot say that it is necessary that the cause should be called on. If it be called on, the most convenient course is that the

(a) *Ubi supra*.(b) 3 Dowl. 259; S. C. 1 C.,
M. & R. 645; 5 Tyr. 180.

(c) 3 Dowl. 261.

(d) 1 C., M. & R. 645.

(e) 3 A. & E. 503; See S. C.
5 N. & M. 178; 4 Dowl. 30.

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be so called. In the case of *Barrow v. Humphreys* (a), Mr. Justice *Best* says, "An attachment for contempt proceeds not upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the Court. Wherever it is distinctly shewn that the party meant to disobey the order of the Court, he is guilty of a contempt. The calling of the witness upon the subpoena, is only for the purpose of obtaining clear evidence of his having neglected to appear, but that is not necessary, if it can be clearly shewn by other means, that the party has disobeyed the order of the Court." That case was referred to and recognised in *Dixon v. Lee*, which has been already cited. Now, in the present case, it is not pretended to be asserted, that the witness ever made any attempt to obey the subpoena. That ground of objection, therefore, clearly fails. As to the objection of the insufficiency of the amount tendered for expenses, I think that cannot now be made, as the witness offered no objection at the time; but on the contrary, was willing to pay his own expenses. With respect to the third ground, namely, that the witness had a reasonable excuse for not attending. I do not think that his master's orders not to leave the premises, can be considered as such. The duty of attending a Court of Justice, in pursuance of a subpoena, is one paramount to that of obeying a master, however urgent his commands may be; and as it is clear, that this witness had sufficient time to have enabled him to attend if he had pleased, the rule for an attachment against him must be made absolute.

Rule absolute.

(a) 3 B. & A. 598.

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Platt afterwards renewed the application in the full Court ; but the Court refused to interfere.

Rule refused.

JONES v. BODDINGTON.

On a motion to discharge the defendant out of custody, under the 48 Geo. 3, c. 123, s. 1, where the plaintiff's residence, and that of his attorney were unknown ; a notice of the motion left with the successors in business of the attorney, who stated, that they were concerned in other business for the plaintiff, and that they would oppose the defendant's discharge, was held sufficient ; and a rule nisi was granted to be served upon them.

SIMON moved to discharge the defendant in the above cause out of custody, he having lain in prison for more than twelve months, at the suit of the plaintiff under an execution in the above cause, for a debt not exceeding 20*l*. The affidavit stated, that the plaintiff's address was unknown, and that various inquiries had been made to discover it, without success : that the plaintiff's attorney, in this action, had retired from business, and that his address could not be ascertained : that he had been succeeded in his business, in Clifford's Inn, by Messrs. Kingdon and Sheppard ; and that upon inquiring there, one of their clerks stated, that they were concerned in other matters for the plaintiff ; but refused to give plaintiff's residence ; that a notice had been served upon Mr. Kingdon, of defendant's intention to apply for his discharge, and that he had stated, that the application would be opposed. Under these circumstances, the present application was made for a rule nisi to be served upon Messrs. Kingdon and Sheppard.

COLERIDGE, J., granted the motion.

Rule accordingly (a).

(a) The rule was afterwards made absolute, on an affidavit of service, no cause being shewn.

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a right of action while he lives abroad, and so have his executors or administrators after his death."

PATTESON, J.—There is no authority in favour of the view taken by the learned counsel.

PER CURIAM.

Rule refused.

Afterwards,

A rule nisi for a new trial, in this case, or for the reduction of the damages, having been obtained, on affidavits, one of which had been sworn before the British consul at Paris, who, it was stated in an affidavit made by a party, in the Foreign Office, was a person empowered by law to take affidavits;

The *Solicitor General* and *Ogle* shewed cause. A British consul, resident abroad, is not competent to take an affidavit in any proceeding, in which an affidavit before a justice of the peace would be insufficient; and, therefore, this affidavit is improperly sworn. The only power he has, is by the stat. 6 Geo. 4, c. 87, s. 20, and that statute only renders an affidavit made before a consul valid in those cases where such affidavit would be valid if sworn, in this country, "before a justice of the peace, or before any other legal or competent authority of the like nature." This question was discussed in *Pickardo v. Machado* (a), which was the case of an affidavit to hold to bail; but no decision was come to on the point. In the case of *In re Barber* (b), it was only a certificate which was made by the consul, and which a notary public was competent to make; and he has the same power by the words of the act, to do all notarial acts, which a notary public is empowered to do.

(a) 4 B. & C. 886; See S. C. 7 D. & R. 478.

(b) 2 Bing. N. C. 268; See S. C. 2 Scott, 436; 4 Dowl. 640.

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cash statement of account, marked (A.), on which a balance of 132*l.* 3*s.* was due to him. The account, however, still ran on. In consequence of the embarrassed state of applicant's affairs, Peach repeatedly pressed for payment of it, and also of a large sum of money, which had been advanced by Peach's father as a loan to the applicant, and for which applicant had executed a mortgage, and afterwards given a cognovit in an action of ejectment brought upon a foreclosure of that mortgage. The applicant being pressed for payment, gave, on the 10th of June, 1842, two joint notes of hand, of himself and his brother in law, one T. B. Trotter, which Peach, in his affidavit, swore "he took in full of the balance then remaining due to him, and received such notes in lieu of cash, well knowing the said T. B. Trotter to be a responsible individual." These notes respectively became due and were paid, on the 13th of February, 1843, and on the 13th of June, in the same year. In consequence of repeated demands both before and after the giving of the promissory notes on the part of the applicant, to be furnished with Peach's account as against him, that gentleman, on the 22nd of June, 1843, gave in two bills, which were appended to the affidavits, and marked numbers (2) and (3), and in the August following, a cash account, marked (B.), on the face of which it appeared, that the sum of 116*l.* had been discharged by the two notes of hand, which had been paid, leaving a balance due against the applicant of 2*l.* 18*s.* 3*d.* Bill, No. (2), consisted of various charges connected with the mortgage transaction, amounting to 93*l.*, which, as the mortgage was only for 500*l.*, and the original loan only for 800*l.*, it was contended by applicant, was a most exorbitant sum. Bill, No. (3), consisted of items of general business, his liability to some of which applicant denied, and amounted to 63*l.* 8*s.* 4*d.* On the part of the applicant, it was alleged that various items in Bill, No. (2), were also to be found included in Bill, No. (1). Peach, in his affidavit, met this by shewing that the sum had been deducted, so as

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Afterwards (a),

COLERIDGE, J., delivered judgment.—This was an application to tax an attorney's bill. I took time to consider, because I wished to read the affidavits and look at the accounts which are somewhat complicated; and also, because the construction of the 41st section of the 6 & 7 Vict. c. 73 was brought in question, which, it was said, was at present before the Court of Exchequer (b). Upon the facts, I have satisfied myself that all the three bills delivered at several times should be considered as one entire bill, and that in itself taxable, and that no such settlement has taken place as in justice ought to preclude a taxation. But it appears that more than a year before this application, two promissory notes were given at eight and twelve months for the amount claimed, and that these were paid at maturity within a year before the application. This was contended to be payment from the time of giving the notes.

It appears to me, that I need not decide this as a general question, and, therefore, need not suspend my judgment till the decision of the Court of Exchequer; though I may observe, that there would be some difficulty in holding the giving of a bill of exchange or promissory note to be a payment, in any case in which a right of action remained on the original bill, if the note or bill were dishonoured at maturity; otherwise this inconsistency might occur,—a bill at a longer date than a year might be given, the application to tax might be made more than a year after the giving of it, and refused, on the ground of payment; yet at maturity the bill might be dishonoured, and the attorney might then sue on his original bill as unpaid.

However, I need not decide this point, because at all events it is clear, that the attorney must have made out and delivered his bill of costs before the bills or notes were given, on the giving of which he relies as payment of it.

(a) In Trinity Term.

See the case reported, *ante*, vol. 1,
p. 1018.(b) *In re Harries*, since decided.

Now here it is sworn on the one side, and not denied on the other, that the two latter bills were not delivered till some days after the latest note was paid; but if these two bills should have been delivered with the first, they are to be considered as parts of it, and then not having been delivered, no bill had been delivered. The rule, therefore, will be absolute.

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Rule absolute.

PRYOR and Another v. SWAINE.

THE defendant, in the above action, had executed a warrant of attorney, in October, 1839, to enter up judgment against him in the above action. The attorney attesting his execution, one Armigal Wade, was the brother, and general London agent of the plaintiffs' attorney. The affidavits were contradictory with respect to the nomination of Mr. A. Wade, by the defendant, as his attorney: but so far as their contents are material, will be found to be referred to in the judgment. In the bill of costs, which the defendant paid to the plaintiffs' attorney, shortly after the execution of the warrant, besides charges "for writing to agent with appointment as to getting warrant of attorney executed"—"for attending you as to execution of warrant of attorney;" were the following items relating to service done, and money paid by the London agent, in and about the very execution of the warrant of attorney; which were, in the first instance, charged against the country attorney, and by him transferred into his bill against the plaintiffs, which the defendant had ultimately to pay: "for preparing the affidavit of its execution, and the commissioner's fee for the oath, and also for filing the warrant." Mr. Armigal Wade, the attorney attesting the execution, had since died.

The London agent of plaintiff's attorney, whose name has been suggested by plaintiffs' attorney, is not a good attesting witness to the execution of a warrant of attorney by the defendant, under the 1 & 2 Vict. c. 110, s. 9, although the defendant of his free choice, adopted him as his attorney; where it appears, that he was acting also as agent for the plaintiffs' attorney in the transaction.

Where a party is under terms to file his affidavits by a certain day, and by reason of some excusable accident, he omits to do so, the rule for permission to

A rule nisi having been obtained in Hilary Term, to set

use an affidavit subsequently filed, is a rule nisi only, in the first instance.

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aside the execution of the warrant of attorney, on the ground that the attorney attesting the execution, had not been nominated by the defendant or chosen by him, which was enlarged to Easter Term, on the terms that the plaintiffs should have till the 10th of April to file their affidavits ;

Montagu Chambers, in the present Term, moved, that the plaintiffs should be at liberty to use an affidavit, which was sworn in February, but had not been filed till the 12th of April; on the ground, that it had been mislaid by mistake, and when wanted for the purpose of filing it, could not be found till the 11th of April. The affidavit in support of this motion, did not state when the loss was first discovered. He submitted, that the rule would be absolute in the first instance.

WIGHTMAN, J., however refused to grant any but a rule nisi; observing, that such had been the course pursued in several late instances of similar applications in the full Court.

Rule nisi (a).

Montagu Chambers afterwards shewed cause against the original rule, and produced affidavits to the effect, that defendant had exercised his free choice in the matter, and that Mr. Armigal Wade had been paid for his attendance by the defendant himself. He contended, that even had the attorney been named by the plaintiffs' attorney, if the defendant, of his free choice, had adopted him as his attorney in the transaction, it was sufficient within the statute. *Haigh v. Frost* (b), *Bligh v. Brewer* (c), *Oliver v. Woodroffe* (d).

(a) *Fitzherbert* afterwards shewed cause against this rule, citing *Turner v. Unwin*, 4 Dowl. 16; and *Wright v. Lewis*, 8 Dowl. 298; but offered to allow it to be made absolute by consent, on payment of costs: which was accordingly

done.

(b) 7 Dowl. 743.

(c) 1 C., M. & R. 651. See S. C. 3 Dowl. 266.

(d) 4 M. & W. 650; See S. C. 7 Dowl. 166.

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from it that he took all the steps subsequent to the execution, which are usual and necessary for completing the security: and, further, in the same bill, are contained charges, which can only relate to service done and money paid by the London attorney in and about the very execution—these charges, not made directly by him to the defendant, but, in the first instance, made against the country attorney, and by him transferred into his bill against the plaintiff which the defendant, of course, was to pay, seem to prove incontrovertibly, that, at the time, when attention was not alive to the consequences, the London attorney considered himself, and was, by all, considered, as acting as the agent for the other. If such be the state of the facts, it seems to me, that this attestation was, in fact, an attestation by the plaintiffs' attorney. No real distinction can be made between the principal and agent, either as to the act done, or the duty attaching to the party in the doing it. It must be considered as an act done by the principal, and as that principal was the plaintiffs' attorney, he could not contract any obligation to the defendant, adverse to the interests of the plaintiffs, and could not stand, therefore, in that relation, towards him, which the statute requires of the attesting attorney. This rule must, therefore, be made absolute.

Rule absolute.

HEATH v. WHITE.

Where the
 party attempt-
 ing to serve
 a writ of sum-

PEACOCK shewed cause against a rule obtained by *Ball*, calling upon the plaintiff to shew cause, why the mons went to the defendant's house, and seeing him standing at a closed window, on the ground floor, told him, in an audible voice, the purpose for which he came, and threw a copy of the writ down in his sight, and in the presence of his wife, who had come out of the house, and who had denied that he was at home, and left it lying there, in the defendant's garden: *Held*, on motion, to set aside the appearance entered for the defendant, and all subsequent proceedings, that the above was not a sufficient service.

appearance entered for the defendant in this cause, the declaration and notice thereof served on the defendant, and all subsequent proceedings thereon should not be set aside, on the ground of irregularity. The circumstances of the case were these. The plaintiff had entered an appearance for the defendant, and served him with notice of declaration, on affidavit of personal service of the writ of summons, by one Charles Thornton. The defendant had obtained the present rule on an affidavit made by himself, stating that no writ of summons purporting to be issued out of this Court in this cause, nor any copy thereof, had been served upon him, nor had any copy of the said writ ever come to his possession or knowledge; and that the first intimation or notice which he had of any proceedings having been taken against him, was the receipt of the notice of declaration. In answer to this, was produced an affidavit of C. Thornton, the party serving the writ of summons, to the following effect:—That on going to defendant's place of residence, he saw the defendant's man-servant, who, on inquiry, stated that his master was at home; that upon knocking at the front door of the defendant's house, he was told by a female, who answered it, that the defendant was not at home; that afterwards the defendant's wife came to the door, and said he had been gone out some time, but would be back in ten minutes; that deponent waited upon the premises for ten minutes, and then again knocked at the front door of the house; that the defendant's wife then repeated that the defendant had gone out; that deponent having turned round towards the window of the house, saw the defendant looking through it at him; that he thereupon immediately called out to him as loud as he could, stating that he had got a writ against him at the suit of the plaintiff, and held the copy for him to see, and threw it down and left it for him in his, the defendant's, garden, before the said window, whilst the defendant was present thereat, the defendant's wife being at the time close to the deponent's elbow, and deponent told her she

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had better pick it up and take it into the house, and give it to her husband as deponent had seen him, to which she replied, "I shall not touch it;" that deponent thereupon came away from the defendant's premises, leaving the copy of the writ where he had thrown it down; and that deponent had been previously informed in the neighbourhood of the defendant's residence, that the defendant was a man that kept out of the way, and was rather difficult to be met with. It is submitted that a service effected under the circumstances detailed, will be considered a sufficient personal service. In *Thomson v. Phenev* (a), Mr. Justice *Patteson* says, "I do not mean to say, that it is necessary to leave the process in the actual corporal possession of the defendant; for, whether the party touches him or puts it into his hand, is immaterial for the purpose of personal service. Personal service may be, where you see a person and bring the process to his notice. If the deponent had informed the defendant of the nature of the process, and thrown it down, that would do." In the present case, the deponent sees the defendant at the window, explains to him the purpose of his visit, and throws a copy down in his sight. [*Wightman, J.*—The window may have been closed, and the defendant so far off, that the defendant may never have heard a word he said.] If this is not a personal service, the defendant may always avoid being personally served. In 1 *Chit. Arch.*, p. 115, 7th ed., it is laid down, that "if after informing the defendant of the nature of the process, and tendering the copy, he refuses to receive it, then placing it on his person, or throwing it down in his presence, or leaving it at his house, would be sufficient service. Where a writ was put through the crevice of a door to the defendant, who had locked himself in, the service was deemed sufficient; and the same, where it was inclosed in a letter, which was proved to have been received by the defendant, and that he took out the copy." And he cites several authorities. [*Wightman, J.*—I think

(a) 1 Dowl. 443.

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received by way of poundage on a levy, which he had professed to make, under a fieri facias, against the defendant in the above action. It appeared, that the defendant expecting that a writ of fieri facias against him would be lodged in the sheriff's hands, had sent a message to his officer, desiring that he might be informed when it arrived, as he would then at once settle it. Accordingly, upon the officer's informing him of its arrival, the defendant sent a person with a bank post bill for 55*l.* 5*s.*, payable at four days' sight, and eight country bank notes of 5*l.* each, which he expected would cover the amount of the warrant. The warrant, however, was indorsed to levy 97*l.* 11*s.*, including the costs of the mandate and warrant. The party entrusted with the money, after some conversation, left it with the sheriff's officer, lying on his table, and went to fetch the balance. On his return, he gave the officer the balance, namely, 2*l.* 11*s.*; but the officer then claimed a further sum of 7*l.* 10*s.*, as due for poundage, he having, in the mean time, as he stated, levied upon the money so left in his hands. The defendant refusing to pay this further sum, the officer levied upon some sheep belonging to the defendant, who then paid the 7*l.* 10*s.*, under protest. No objection was made by the officer, at the time, to the money being in a bank post bill, or country notes.

Raines shewed cause. The sheriff's officer acted rightly in levying upon the bill and notes. He would not have been justified in taking them as cash. He was, therefore, bound to make a levy, and so was entitled to poundage.

Lush, in support of the rule. The levy was merely colourable; and not being bonâ fide, the Court will not consider the sheriff as entitled to poundage. The officer made no objection to the bill or notes, as not being equivalent to cash; and, it is clear, that he received them at the time, as part payment. It is even questionable, whether he is entitled to poundage, when he levies upon

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ELLEMAN v. WILLIAMS.

Where a cause, with all matters in difference, was referred to arbitration, the costs of the cause and of the reference to abide the result, and the costs of a cross action between the parties, to be also in the discretion of the arbitrator, but no power was given to enter up judgment for the amount awarded; and the arbitrator found that a sum of 17*l.* 3*s.* was due to the plaintiff, and that nothing was due with regard to any other matters in difference between them, and that the costs of the cross action should be borne equally between the parties; and it appeared that the defendant had successfully resisted an application to try the cross action before the sheriff: *Held*, the Master having taxed the plaintiff's costs on the higher scale, that the Court would order a review of his taxation.

JERVIS had obtained a rule, calling on the plaintiff to shew cause why the Master should not review his taxation herein. The plaintiff and defendant, it appeared, had brought cross actions against each other, in which the particulars of demand in the one action were the same as those of the set off in the other. In the action by the present defendant against the present plaintiff, which was that first brought, a summons had been obtained to try before the sheriff. This application had been successfully resisted by the present defendant, on the ground that the debt sought to be recovered was above 20*l.* On the present action coming on to be tried at the Hereford Summer Assizes of 1843, the cause, with all matters in difference, was referred, the costs of the cause and of the reference to abide the result, and the costs of the cross action commenced by the present defendant, to be in the discretion of the arbitrator. There was no power given to enter up judgment for the amount awarded. The arbitrator found that a sum of 17*l.* 3*s.* was due to the plaintiff, and that nothing was due with regard to any other matters in difference between them; and ordered that the costs of the cross action should be borne equally between the parties. The Master had taxed the costs upon the higher scale. It was submitted, that in so doing he had acted wrongly. In *Wallen v. Smith* (a), the sum awarded by the arbitrator under an order of reference, was less than 20*l.*, and it was held, that the Master should have taxed the costs upon the lower scale.

Huddleston now shewed cause. The directions to taxing officers, Hil. Vac., 4 Wm. 4, are in the nature of "directions" only, and not rules depriving them of a discretionary

(a) 3 M. & W. 138; See S. C. 6 Dowl. 103.

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satisfaction of his demand." And if it should be thought to be a sum "agreed to be paid on the settlement of the action," then not only the sum of 17*l.* 3*s.*, was agreed to be paid under the terms of the reference, but also the costs, for they were to abide the result, and these together would amount to a sum exceeding 20*l.*

Jervis, in support of the rule. To entitle the plaintiff to a taxation on the higher scale, he must shew that he has recovered, &c., more than 20*l.* The meaning of the term "recovery" is not restricted as in the 43 Geo. 3, c. 46; but means any way of recovery, by legal or analogous means. And to this effect are the dicta of Lord *Abinger*, C. B., and *Parke*, B., in the case of *Wallen v. Smith (a)*, which has been cited. There is a fallacy in the supposition, that the costs are part of the sum "accepted by the plaintiff in satisfaction." The sum of 17*l.* 3*s.* is all that he accepts, the costs are a mere legal incident, necessarily attendant on the decision in his favour. He was stopped by

COLERIDGE, J.—This rule must be made absolute. In the case of *Wallen v. Smith*, the remarks of Lord *Abinger*, C. B., and *Parke*, B., clearly shew that the term "recovery" is to be taken in its popular, and not in its strictly legal sense; and means that if a party does not recover more than 20*l.* as the fruits of his process, he is to be allowed costs only according to the lower scale. It has been contended, that as this was a reference, and as such, an agreement to take whatever sum the arbitrator should think fit to award, the amount found by him to be due to the plaintiff, is the amount of the debt and costs taken together. But looking at the terms of the rule, I think it cannot fail to be seen, that it was the intention of the parties to make a distinction between the debt and costs, and that the latter were to attend upon the disposal of the former. I,

(a) 3 M. & W. 138. See S. C. 6 Dowl. 103.

therefore, think that this case falls under the rule of Hilary Vacation, and the Master should consequently have taxed the costs on the lower scale. I by no means agree with what has been said as to the discretion of the Master, as to taxing the costs on the lower scale. I conceive that when the sum recovered is less than 20*l*., he is bound to do so, and has no discretion, and if he does not, this Court will direct a reviewal of his taxation.

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Rule absolute.

HERBERT v. SAYER.

(*In the full Court.*)

ASSUMPSIT against the acceptor of a bill of exchange, stating that one T. Spence, the drawer, had indorsed it to one, T. Rogers, who had indorsed it to the plaintiff.

Assumpsit against acceptor of a bill of exchange, stating an indorsement by S. the drawer, to one R., and by R. to the plaintiff.

The defendant pleaded seven several pleas, the sixth and seventh of which alone are material. The fourth plea

The defendant pleaded, sixthly, in effect, that he accepted the bill in question for the accommodation of S., the drawer, to enable him to deposit it with R., as a collateral security for a debt due to R., from S.; that R. took it on those terms; that S., before the bill became due, paid R. part of that debt, and tendered the residue; that R. refused to receive the money tendered, kept the bill, and indorsed it to the plaintiff as a mere trustee, R. and the plaintiff conspiring and colluding to cheat the defendant: *Held*, on demurrer, that *de injuriâ* was a good replication to this plea, and that the plea contained merely matter of excuse.

The defendant pleaded, seventhly, in effect, that the plaintiff had been twice bankrupt, and obtained his certificate each time, but that his estate under the second bankruptcy had not paid 15*s*. in the pound, and that the bill was indorsed to him after his second certificate: *Held*, good by the Court of Queen's Bench on special demurrer.

Held, had, by the Court of Exchequer Chamber reversing the judgment in B. R., because it did not state that the assignees had interfered, or required the defendant to pay the amount to them.

The plea stated, that plaintiff became and was a bankrupt; but did not state any act of bankruptcy, on which the commission or fiat was founded: *Held*, sufficient, on special demurrer, by the Court of Queen's Bench.

After judgment for the plaintiff in the Court of Error, the Court of Queen's Bench allowed the plaintiff to enter a retraxit for the defendant of a plea, which involved an issue in fact, and which had been left on the record, and carried up in the transcript, for the sole purpose of explaining the record, which would have otherwise been unintelligible.

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becomes incidentally material, as being referred to and incorporated with the sixth (a).

(a) Fourth plea. That he accepted the said bill in the declaration mentioned at the request of the said Thomas Spence, and without ever having received any consideration or value whatever, for his said acceptance thereof, and for the accommodation of the said Thomas Spence, and in order that he might deposit the same with the said Thomas Rogers, as a collateral security as hereinafter mentioned, and for no other purpose whatsoever: That after he had so accepted the said bill of exchange, to wit, on the 9th day of June, in the year of our Lord, 1842, the said Thomas Spence indorsed and delivered the said bill to the said Thomas Rogers, and the said Thomas Rogers then took and received the same as a collateral security for the payment of the sum of 25*l.* then due to the said Thomas Rogers, as the balance of a certain other bill of exchange for 50*l.*, then in his possession, and of which he was the indorsee, and holder, to wit, a certain bill of exchange drawn by the said Thomas Spence upon, and accepted by one Matthew Foster, whereby the said Thomas Spence required the said Matthew Foster, three months after the date thereof, to pay his, the said Thomas Spence's order, 50*l.*, and which said bill the said Thomas Spence indorsed to one George Baker, who indorsed the same to the said Thomas Rogers, the residue

of the last mentioned bill, to wit, 25*l.*, having been paid to the said Thomas Rogers by the said Thomas Spence, before the said indorsement to the said Thomas Rogers of the bill of exchange in the declaration mentioned: That the said bill of exchange in the declaration mentioned, was delivered to and received by the said Thomas Rogers for such purpose as in this plea mentioned, and no other purpose or consideration, or value whatsoever: That after the said Thomas Rogers had taken and received the said bill of exchange in the declaration mentioned, and whilst the same was in his custody and possession, and before the same had become due or payable, to wit, on the 9th day of July in the year of our Lord, 1842, the said Thomas Spence paid to the said Thomas Rogers, who then accepted and received the same, a certain sum of money, to wit, 15*l.* in part payment of the said balance of 25*l.*, then remaining due and payable to the said Thomas Rogers on the said bill of exchange for 50*l.* hereinbefore mentioned, and then there remained due and payable, in respect of the said last-mentioned bill, a certain small sum of money, to wit, the sum of 10*l.* and no more: That afterwards and whilst the said bill of exchange in the declaration mentioned, was in the custody and possession of the said Thomas

'The sixth plea was to this effect (a). That the defendant accepted the bill in question, for the accommodation of the

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Rogers, for such purpose as aforesaid, and before the same had become due or payable, to wit, on the 1st day of September, in the year of our Lord, 1842, the said Thomas Spence tendered and offered to the said Thomas Rogers, a certain sum of money, as and being the balance then remaining due on or in respect of the said bill of exchange for 50*l.*; and also, for or in respect of any interest or damages which might have accrued or could be claimed by the said Thomas Rogers on or in respect of the last mentioned bill, to wit, 11*l.*, which last mentioned sum was the full amount to which the said Thomas Rogers was then at the time of the said tender entitled upon or in respect of the said bill for 50*l.* to secure the payment of which, the bill in the declaration mentioned, was deposited with the said Thomas Rogers as in this plea aforesaid; and which tender and offer of the said Thomas Spence, the said Thomas Rogers then wholly refused to accept or receive, and then wrongfully kept and detained the said bill of exchange in the declaration mentioned, and wholly refused to deliver up the same either to the said Thomas Spence, or the defendant or any other person, although he was then, to wit, on the said day and year aforesaid, requested by the said Thomas Spence, and the defendant so to do: That after the said tender and offer had been so made to and refused by the said Thomas Rogers, as aforesaid, and

after the said Thomas Rogers had so wrongfully refused to deliver up the said bill, as aforesaid, to wit, on the day and year last aforesaid, he, the said Thomas Rogers indorsed the said bill of exchange in the declaration mentioned to the plaintiff, and the plaintiff then took and received the said bill of exchange in the declaration mentioned, with full knowledge and notice of the premises. Verification.

Replication to the fourth plea, *de injuriâ* and issue joined.

(a) Sixth plea. That he accepted the said bill of exchange in the declaration mentioned, for the accommodation of the said Thomas Spence, and without ever having received any consideration or value for the acceptance thereof, and for the purpose and in the manner and form as in his fourth plea above alleged: That the said Thomas Spence deposited the said bill of exchange with the said Thomas Rogers, who received the same for the purpose and in the manner in the said fourth plea, in that behalf alleged, and for no other purpose, consideration, or value whatever: That the said Thomas Spence paid to the said Thomas Rogers, the said sum of money in the said fourth plea in that behalf mentioned, to wit, 15*l.* in part payment of the said balance of 25*l.*, in manner and form as, and at the time in, the said fourth plea alleged: That the said Thomas Spence tendered and offered to the said Thomas Rogers

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drawer, Spence, to enable him to deposit it with Rogers, as a collateral security for a debt due from him to Rogers ; that Rogers took it on those terms ; that Spence, before the bill became due, paid Rogers part of that debt, and tendered the residue ; that Rogers refused to receive the money tendered, kept the bill, and indorsed it to the plaintiff as a mere trustee, Rogers and the plaintiff conspiring and colluding to cheat the defendant.

The seventh plea was to the effect (a), that the plaintiff had

the said sum of money in the said fourth plea, in that behalf mentioned, being the balance remaining due to him upon and in respect of the said bill of exchange for 50*l.* in the said fourth plea mentioned, at the time therein mentioned, which said sum the said Thomas Rogers then wholly refused to accept, as in the said fourth plea mentioned, and then refused to deliver up and wrongfully detained the said bill of exchange in the declaration mentioned, in manner and form as in the said fourth plea above in that behalf alleged : That after the said tender to and refusal by the said Thomas Rogers, and after his said refusal to deliver up the said bill of exchange in the declaration mentioned in the fourth plea alleged, to wit, on the day and year in the said fourth plea, in that behalf mentioned, the said Thomas Rogers indorsed the said bill of exchange in the declaration mentioned, to the plaintiff, with the intent, and in order to cheat and defraud the defendant of the amount thereof, by his the plaintiff's suing the defendant upon the same as a mere trustee for the said Thomas Rogers, and

forcing and compelling the defendant unjustly to pay the said bill, without his, the plaintiff's having any beneficial interest in the same, and the plaintiff then took, had, and received the said bill in the said declaration mentioned, with the same intent and purpose, and he and the said Thomas Rogers then conspired and colluded together, to cheat and defraud the defendant of the amount of the said bill in the declaration mentioned by the means aforesaid. Verification.

(a) Seventh plea. That before and after the 1st of March, 1830, and from thence continually until the suing out of the commission of bankruptcy hereinafter mentioned, the plaintiff was a dealer, and chapman, and a trader within, and subject to the statutes then in force, concerning bankrupts, and as such trader heretofore, to wit, on the said 1st day of March, 1830, became and was indebted to Samuel Webb, a subject of this realm, in the sum of 100*l.* and upwards, for a true and just debt, and thereupon the plaintiff, so being such trader, and being and continuing so indebted, he, heretofore, to wit, on, &c., aforesaid, became and was a bankrupt

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the plea was argumentative ; and that no act of bankruptcy was alleged to support the commission or the fiat.

This case came on for argument in the Queen's Bench, in Easter Term, 1843.

Atkinson appeared for the plaintiff.

Willes appeared for the defendant.

The following cases were cited, *Isaac v. Farrar* (a), *Scott v. Chappelow* (b), *Mitchell v. Cragg* (c), *Humphreys v. O'Connell* (d), *Purchell v. Salter* (e), *Fyson v. Chambers* (f), *Ex parte Welsh* (g), *Butler v. Hobson* (h), *Ex parte Jungmichel* (i), *Young v. Rishworth* (k), *Webb v. Fox* (l), *Kitchen v. Bartsch* (m), *Hayllar v. Sherwood* (n), *Parker v. Riley* (o).

Cur. adv. vult.

LORD DENMAN, C. J., afterwards delivered the judgment of the Court (p).—The replication to the sixth plea in this case being *de injuriâ*, the question is raised whether that plea discloses matter in excuse or in discharge. In the case of *Purchell v. Salter*, the same question was raised, but under circumstances so unlike the present, that that case affords no guide to us. The case of *Humphreys v. O'Connell*, is more like the present, where the plea was held to be an excuse. But the case of *Mitchell v.*

(a) 1 M. & W. 65 ; See S. C. 4 Dowl. 750.

(b) 2 Dowl. 78, N. S. ; See S. C. 5 Scott, N. R. 148 ; 4 M. & G. 336.

(c) 10 M. & W. 367 ; See S. C. 2 Dowl. 252, N. S.

(d) 7 M. & W. 370 ; See S. C. 9 Dowl. 213.

(e) 1 Q. B. 197 ; See S. C. 9 Dowl. 517 ; 1 G. & D. 682.

(f) 9 M. & W. 460.

(g) Mont. 276.

(h) 4 Bing. N. C. 290 ; See S. C. 6 Dowl. 409 ; 5 Scott, 798.

(i) 2 Mont. D. & D. 471.

(k) 8 A. & E. 470 ; See S. C. 3 N. & P. 585.

(l) 7 T. R. 391.

(m) 7 East, 53 ; See S. C. 3 Smith, 58.

(n) 2 N. & M. 401.

(o) 3 M. & W. 230 ; See S. C. 6 Dowl. 375.

(p) In the Vacation, after Easter Term, 1843.

Cragg, still more resembles the present, and there also the plea was considered to be in excuse. *Parke*, B. there says, "the breach is, that the defendant did not pay the plaintiff; the plea in truth says, I admit I never did pay the plaintiff, because he was the holder of the bill under such circumstances that he was not entitled to be paid; it is like the case of *Isaac v. Farrer*." In the present case, the plea shews nothing illegal in the bill originally; it shews that the defendant accepted it for the accommodation of the drawer, Spence, to enable him to deposit it with one Rogers, as a collateral security for a debt due to Rogers from Spence; that Spence took it on those terms; that Spence, before the bill became due, paid Rogers part of that debt, and tendered the residue; that Rogers refused to receive the money tendered, kept the bill, and indorsed it to the plaintiff as a mere trustee, Rogers and the plaintiff conspiring and colluding to cheat the defendant. These averments are said to shew illegality in regard to the bill; but in truth they amount to little more than a statement that the plaintiff took the bill with knowledge of the circumstances, and without giving any consideration for it. The matter, therefore, stands thus, that the bill was originally given to Rogers, but not to be enforced under certain circumstances; that these circumstances occurred before the bill became due, and that Rogers, knowing he could not enforce the bill, indorsed it to the plaintiff, that he might attempt to do so for his, Rogers's, benefit. If Rogers had been the plaintiff, the direct transaction with him might, perhaps, have been matter of discharge, but as the plaintiff is a stranger to the defendant, and *primâ facie*, there is a promise in law by the defendant to pay the plaintiff, arising out of the indorsement of the bill, the plea which discloses transactions with the former holder, Rogers, and the circumstances under which the plaintiff took the bill from him, amounts only to an excuse for not performing to the plaintiff that *primâ facie* promise, and the replication *de injuriâ* is, therefore, good.

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The seventh plea in this case states, that the plaintiff has been bankrupt twice, and obtained his certificate each time, but that his estate under the second bankruptcy has not paid fifteen shillings in the pound, and that the bill was indorsed to him after his second certificate. To this there is a special demurrer, assigning for cause, that it does not appear that the plaintiff's assignees had interfered, and that it is consistent with the plea that the plaintiff may be suing either in his own right, or for the benefit of the assignees. It is contended for the plaintiff, that he has a right to sue, unless his assignees interfere, and that the allegation of such interference should be made by the defendant, in order to defeat the action. The defendant, on the other hand, contends, that the law passes the interest in the bill to the assignees, who can sue on it in their own names, and that the plaintiff is bound to shew that the assignees have relinquished their right to do so. The case of *Young v. Rishworth* (a), is a direct authority in favour of this plea. The effect of that decision is said by *Parke, B.*, in *Fyson v. Chambers* (b), to be that the plea is *primâ facie* an answer to the action, and that the facts of plaintiff being a mere trustee, or having the consent of his assignees ought to be replied, and the case of *Fyson v. Chambers*, which recites that a mere wrong doer cannot in trover set up the title of the assignees, was distinguished by the Court. Whether it be in truth distinguishable, or be contrary to *Young v. Rishworth*, we will not now elaborately discuss; it is sufficient to say that we are satisfied with the decision in *Young v. Rishworth*, and that it is so directly in point, that we think the defendant entitled to our judgment upon this plea.

Judgment for the plaintiff on the replication to the sixth plea, and for the defendant on the seventh plea.

(a) 8 A. & E. 470; See S. C. 3 N. & P. 585.

(b) 9 M. & W. 460.

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is of great importance with reference to the right of a bankrupt twice certificated, and who has not paid fifteen shillings in the pound, to after-acquired property such as the bill for which the plaintiff sues; and the question is, whether he has a good right to such property against the parties on the bill and all the world, except the assignees; or whether he has no right whatever, so that he cannot sue at all upon the bill. We are of opinion, that he has a good right, except as against his assignees; and as the plea does not state that they have interfered, it does not contain a complete defence; and to this conclusion we have come, as well upon the authorities, as upon the reason and convenience of the principles which they establish.

In the first place, we think that a bankrupt in this condition, is in the same situation with respect to property which has accrued after a second certificate, as an uncertificated bankrupt was, with respect to property which had accrued after the assignment, before the recent statute. By the 6 Geo. 4, c. 16, s. 127, which provides for the after-acquired property of the bankrupt twice certificated, it is enacted, that "his future estate and effects (except his tools of trade, &c.) shall vest in the assignees under the said commission, who shall be entitled to seize the same, in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission." Such effects, by the former statute, the 5 Geo. 2, c. 30, were only liable to the execution of a creditor. The effect of this section is, to put such future property on the same footing, as future property under the assignment. The operation of the assignment is declared by the 6 Geo. 4, c. 16, s. 63. It provides "that the commissioners shall assign to the assignees—all present and future personal estate of such bankrupt—and all property which he may purchase, or which may revert, descend, be devised, or bequeathed, or come to him, before he shall have obtained his certificate,—and all debts due or to be due to him;—and that such assignment shall vest the property, &c. in

such debts, in such assignees, as fully as if the assurance whereby they are assured had been made to such assignees; and after such assignment, neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same;—but such assignees shall have like remedy to recover the same,—as the bankrupt himself might have had if he had not been adjudged bankrupt.” By the statute 1 & 2 Wm. 4, c. 56, ss. 25 & 26, the estate becomes vested to the same extent in the assignees by virtue of their appointment, without any deed of assignment.

By the operation of these statutes, the future property of the bankrupt, after a second certificate, becomes vested in the assignees by the mere appointment, in the same way as future property acquired after the assignment, and before the certificate; but under the prior statutes, and by virtue of the construction put upon them by the Courts, the assignment in like manner vested property acquired before the certificate in the assignees. Under the 34 & 35 Hen. 8, c. 4, the Lord Chancellor, &c., might order the bankrupt's goods and debts to be assigned to the creditors. This statute was followed by the 13 Eliz. c. 7, which directs an assignment by deed; and section 11, directs that lands and goods acquired before the creditors are paid, shall be bargained, sold, delivered, and used for the payment of creditors in the same way as other lands and goods which he had, when he was declared to be bankrupt. Then follows the 1 Jac. 1, c. 15, which, reciting the insufficiency of the powers given to the commissioners touching debts due to the bankrupt, enacts (a), that they shall have power to grant and assign debts due or to be due to the bankrupt to the use of the creditors, and that the same grant or assignment shall so vest the property of the debt or debts in the person to whom they are granted or assigned, as fully to all intents and purposes as if the contract, whereupon such debt or debts shall arise or grow, had been made with the said person or persons, and the bankrupt shall afterwards have no power to recover the same; using the same language

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almost verbatim, as is found in the statute 6 Geo. 4, c. 16. The statute 5 Geo. 2, c. 30, s. 26, directs the commissioners to assign to the assignees the bankrupt's estate and effects.

The construction put upon these statutes has been, that all future personal property as well as present, passed by the original assignment by the commissioners to the assignees. This was decided in the case of *Kitchen v. Bartsch* (a), in which all the authorities were reviewed. The new Bankrupt Act, 6 Geo. 4, c. 16, as it appears to us, only enacts, in express terms, that which was law by the construction of the Courts before; namely, that the assignment conveyed future property acquired before the certificate, and, consequently, whatever right an uncertificated bankrupt had before that statute, in after acquired property, an uncertificated bankrupt has still. Then a twice certificated bankrupt, when the estate does not pay fifteen shillings in the pound, is in the same position, and this was the opinion of the Court of Exchequer, in the case of *Fyson v. Chambers* (b).

The question that then remains, is what was the right of an uncertificated bankrupt to after acquired property before the recent statutes? The leading case on this subject is *Fowler v. Down* (c), in which it is laid down, that the bankrupt has a right to such property against every body but the assignees, and that it is not competent for a stranger to dispute his title. That was an action of trover, not for goods which had been in the bankrupts' possession, but which were in the defendant's hands and transferred to the bankrupt by the owner for a valuable consideration. The case therefore, was not decided on the ground, that actual possession gives a title as against a wrong-doer, but on the principle, that the bankrupt had a special property, a title of his own, without actual possession. It is true, that in giving judgment Lord Chief Justice *Eyre* supposes, that a new assignment to the assignees of the after-acquired property was necessary to give them a title, which is incorrect; but that is not the sole ground on which he rests

(a) 7 East, 53; See S. C. 3 Smith, 58. (b) 9 M. & W. 460. (c) 1 B. & P. 44.

the case, nor do the other Judges rely upon it. It is also to be remarked, that the case of *Ashley v. Kell* (a), was mistakenly cited by *Buller, J.*, as being an authority for the above mentioned position, which it is not; for it is clear, under the 5 Geo. 2, c. 30, the future effects of the bankrupt, who had twice obtained his certificate, and did not pay fifteen shillings in the pound, did not pass to his assignees.

The point decided, however, in *Fowler v. Down* was expressly sanctioned by the Court of King's Bench, in *Webb v. Fox* (b), and prior to that case, Lord *Kenyon* had decided a similar point in the case of *Laroche v. Wakeman* (c), where an uncertificated bankrupt assigned to the plaintiff, who maintained trover. In *Kitchen v. Bartsch* (d), it was considered as established law. The same doctrine was held by *Gibbs, C. J.*, in *Cumming v. Roebuck* (e), who decided that the plaintiff, an uncertificated bankrupt, might sue for the non-acceptance of goods under a contract with himself, if the assignees did not interfere, for he considered that he might sue as their trustee. In *Ex parte Cartwright* (f), Lord *Eldon* treated the doctrine as fully established; so much so, that he seems to have thought that a commission might be supported on his petition, if the assignees did not interfere; and finally, in *Drayton v. Dale* (g), all the Judges of the King's Bench recognised this principle, although some of them put the case also on the ground of estoppel.

Such are the authorities in favour of the right of an uncertificated bankrupt against all but his assignees; and certainly this has been treated as a well known principle in this branch of law, perfectly well established for a long series of years. On the other side, the case of *Young v. Rishworth* (h) was cited, and was that on which the Court of Queen's Bench relied in the decision of the present case. There the Court decided, that the 127th section of the act

(a) 2 Stra. 1207.

(b) 7 T. R. 391.

(c) Peake, N. P. C. 140.

(d) 7 East, 53; See S. C. 3 Smith, 58.

(e) Holt, N. P. C. 172.

(f) 2 Rose, 230.

(g) 2 B. & C. 293; See S. C. 3 D. & R. 534.

(h) 8 A. & E. 470; See S. C. 3 N. & P. 585.

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6 Geo. 4, c. 16, was retrospective, so as to operate on a bankrupt who had obtained one certificate before the statute, a point to which the principal attention of the Court was directed; but they also decided, that when there was a second certificate, the plaintiff's bankruptcy was a bar: probably on the ground that the 127th section of 6 Geo. 4, c. 16, vesting the right of action in the assignees, distinguished this case from that of an action by an uncertificated bankrupt; but the reasons for that part of the judgment are not assigned. If that conjecture is right, we think that ground is untenable, as we have before given our opinion, that the rights of the bankrupt are the same in both cases. In the Court of Exchequer, in the argument of *Fyson v. Chambers* (a), and on the argument of this case now before us, it was suggested, that *Young v. Rishworth* (b) was distinguishable, because it was not averred in the plea, that the money sought to be recovered was after acquired property; and also that the plea was *primâ facie* an answer, and that if the assignees had permitted the bankrupt to act on their behalf, such fact ought to have been replied, and that the case may be supposed to have been decided on one or both of those grounds. Upon consideration, we think that it cannot be supported on either; for not only the weight of authority, but reason and convenience are in favour of the right of the bankrupt to sue. All future property and contracts vest in the assignees by the words of the statute 6 Geo. 4, c. 16, and by the construction put by the Courts, on the words of the older statutes. But there must be property in the bankrupt or contracts with him, before such property or contracts can vest in the assignees. The effect of the statutory enactments may be either to transfer immediately such property or contract from the bankrupt to the assignees, or to give the assignees the beneficial interest, and to make the bankrupt acquire property or contract for their benefit, only in the nature of an agent. The cases accord with the latter supposition, and it is most consistent with convenience; for otherwise,

(a) 9 M. & W. 460. (b) 8 A. & E. 470; See S. C. 3 N. & P. 595.

there would be no protection for persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchase from him, but payments for such purchase, and for all other debts due to an uncertificated bankrupt, would be invalidated. The Legislature, by several statutes, has protected all payments by and to, and all dealings and transactions with, a bankrupt, *bonâ fide* made or entered into, without notice of the act of bankruptcy before the fiat; but there is no provision by the statute law for such payments, dealings, or transactions, after the fiat; and the only way by which they can be rendered valid, and great confusion, inconvenience, and hardship prevented, is, by adopting the latter construction, and by holding that the bankrupt acquires property and contracts for the assignees, who may, whenever they please, disaffirm his acts; but until they do so, his acts are all valid. If then an uncertificated bankrupt contracts on behalf of, and for the benefit of his assignees, it is perfectly clear that he may sue on such contract in his own name; and it is no plea that the property is vested in, or the contract made for the benefit of the assignees, unless it contains an averment that they have interfered and desired the defendant to pay to them; any more than it would be a defence to the action by a factor, broker, or agent for another, to plead that the property belonged to, or the contract was made by the plaintiff for his principal. Such a plea, to be a good answer, must aver that the principal has interposed, or must disclose some other ground of defence.

For these reasons, therefore, which, on account of the great importance of the case, we have given at some length, we think that the plea is bad, for not stating, as was done in *Kitchen v. Bartsch* (a), that the assignees had interfered and required the defendant to pay to them; and we all think, that the judgment must be reversed, and judgment given for the plaintiff on the demurrer to the seventh plea.

Judgment on the seventh plea reversed.

(a) 7 East, 53; See S. C. 3 Smith, 58.

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The Same *against* The Same.*(In the full Court.)*

See the marginal note,
ante, p. 49.

ATKINSON had obtained a rule to shew cause why the plaintiff should not be at liberty to enter a retraxit on the roll, for the defendant, of his fourth plea. It appeared, that after judgment in the Queen's Bench, defendant took out a summons to withdraw the first five pleas, which were issues of fact (having succeeded on the seventh which went to the whole cause of action), and thereupon an order was made to withdraw them. Costs were then taxed, and after setting off the costs of the issues, 24*l.* 16*s.* was found in favour of defendant, for which he signed final judgment, and upon that judgment brought an action in the Court of Common Pleas. The plaintiff then brought the above writ of error, and the Court of error reversed the judgment of the Court below on the last issue. The plaintiff signed interlocutory judgment, and the defendant had applied to a Judge at Chambers to set it aside, on the ground that there was an issue of fact still on the record undisposed of. The Judge had made an order to stay proceedings, until application could be made to this Court. The supposed issue of fact was the fourth plea, which had been left on the record, because the sixth plea referred to it, and unless it had been so left, the sixth issue would have been wholly unintelligible, more especially as being a demurrer to a replication *de injuriâ*, it was necessary to see whether the plea was matter of discharge or excuse. It was sworn by plaintiff's attorney that the fourth plea was allowed to remain on the record for no other reason, and with no other intent or purpose whatever, than to render the sixth plea intelligible to the Court below and Court of error.

Willes shewed cause (*a*) upon an affidavit, which stated that the defendant had never withdrawn or abandoned the fourth issue; that it was allowed to remain on the record

(*a*) In Trinity Term.

at the special instance and request of the plaintiff's attorney; that the first, second, third, and fifth only were withdrawn, and that plaintiff's attorney was so informed at the time when the roll was carried in. The affidavit also stated that the defendant had merits. [*Patteson*, J.—What purpose could the plaintiff have for allowing it to remain?] He must be judged by his acts and not by his motives. There is an issue of fact on the record, and the defendant has a right to have it submitted to a jury. The writ of error was irregular, *Tolson v. Kaye* (a).

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Erle (*Atkinson* with him), in support of the rule. The affidavits are quite consistent in this, viz. that it was agreed between them that the fourth issue should remain on the record—the affidavit of the plaintiff's attorney further stating, that it was for the sole purpose of explaining the sixth plea to the Court above—this purpose is not denied. Again, it is clear that the defendant had acted upon the order to withdraw the first five pleas, for he had brought an action in the Court of Common Pleas for the 24*l.* 16*s.*, which could not have been done unless he had withdrawn all five, as the Master would not have taxed his costs unless he had been satisfied of this. The bill of costs (part of the affidavit) also shewed he had acted upon it and considered it a retraxit of all five. There was also an item therein for “attending to enter retraxit, 3*s.* 4*d.*,” which shewed he had made his election to withdraw the first five pleas.

PER CURIAM.—We think he made his election.

Rule absolute to enter a retraxit of the fourth plea. (b)

(a) 7 Scott, N. R. 222.

(b) The following retraxit was entered: “Be it remembered, that on the day of A.D. 1844, comes the defendant in his

own proper person, and says, that he wishes to withdraw the fourth plea herein, and hath wholly withdrawn the same.” See Sell. Prac. ‘Retraxit.’

COURT OF COMMON PLEAS.

Easter Term.

IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

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BOODLE v. CAMBELL.

In debt on an indenture of demise for 191*l.* 5*s.*, two years and a half's rent, the defendant pleaded as to 40*l.* 10*s.*, parcel, &c., that before the premises were demised by the plaintiff to the defendant, the plaintiff had conveyed a moiety thereof to E. B., in fee; that the plaintiff was in possession of the said moiety of the premises up to the time of the demise; that after the commencement of the

DEBT upon an indenture of demise. The declaration stated that on the 27th of July, 1840, by a certain indenture then made between the plaintiff of the one part, and the defendant of the other part (excusing profert) the plaintiff demised to the defendant certain lands, &c. from the 25th of March then last past, for the term of ten years thence next ensuing, at a yearly rent of 76*l.* 10*s.* payable by equal half-yearly payments; that the defendant covenanted to pay the rent; and that on the 29th of September, 1842, 191*l.* 5*s.* was due for two years and a half of the said rent.

Third plea. And for a further plea as to the sum of 40*l.* 10*s.* parcel, &c., the defendant says, *actio non*, &c., because he says, that before and at the time of the making of the indenture of lease next hereinafter mentioned, the plaintiff was seised in her demesne as of fee of and in parcel of the said demised premises, to wit, one full and undivided moiety or half part of and in divers of the said demised pre-

suit, the devisees of E. B. gave notice to the defendant of the conveyance to their testator, and demanded payment of a just proportion of the rent reserved, and threatened the defendant, in case of non-payment, to eject him, and put the law in force; that 40*l.* 10*s.* was the sum due on a just apportionment of the rent reserved, in respect of the said moiety of the premises, and that if defendant had not paid it to the devisees of E. B., they would have ejected him; wherefore the defendant paid them the same: *Held*, upon demurrer, that the plea was bad, as a plea of eviction, the demand of payment by the devisees not having taken place, till after the rent became due; and bad as a plea of payment, the payment not having been made to the plaintiff, nor by her authority, and there being no debt due from the plaintiff to the devisees of E. B., nor any incumbrance upon the land, which the defendant was forced to discharge.

mises, to wit, &c.; and the plaintiff being so seised, afterwards, and before the making of the indenture in the declaration mentioned, to wit, on the 31st of December, 1838, and the 1st of January, 1839, by indentures of lease and release conveyed the said parcel of the said demised premises, to one Edward Boodle, in fee. The declaration then alleged the seisin of Edward Boodle, and that on the 16th of February, 1841, being so seised, he duly made and published his will in writing, whereby he devised the said parcel of the said demised premises to his wife Ann Boodle and John Pickstock, in fee. The declaration then stated the death of Edward Boodle on the 16th of February, 1841, whereupon and whereby the said Ann Boodle and John Pickstock became and still continue to be seised of the parcel so devised; and that the plaintiff at the time of the making of the said indenture of release, and thence up to and at the time of the making of the indenture in the declaration mentioned, was in possession of the said parcel of the said demised premises. That after the commencement of the suit, and before this day, to wit, &c., the said Ann Boodle in the will of the said testator mentioned, and the said John Pickstock gave notice to the defendant of the premises in this plea mentioned, and then required the defendant to pay to them, or one of them, such portion of the said rent reserved by the said indenture in the declaration mentioned, not paid over to the plaintiff at the time of the giving of the said notice, as might on a just apportionment of the said rent be found to be the just proportional part thereof in respect of the said parcel of the said demised premises; and the said Ann Boodle and John Pickstock then gave notice to the defendant, and threatened the defendant that if he should neglect or refuse forthwith to pay over to the said Ann Boodle and John Pickstock, such proportional part of such rent as aforesaid, the said Ann Boodle and John Pickstock would instantly proceed to eject and expel the defendant from the said parcel of the said demised premises, and would duly put the law in force against the defendant as they might be

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advised. That at the respective times, when the said parcel of the said debt became due, as in the declaration mentioned, and when the said notice was given, the said sum of 40*l.* 10*s.* was and yet is the sum which on a just apportionment of the rent reserved by the said indenture in the declaration mentioned, would be and is the just proportional part of the said rent in respect of the said parcel of the said demised premises; and that at the said time of the giving of the said notice, the said sum of 40*l.* 10*s.* was wholly unpaid to the plaintiff. That the said rent, whereof the said sum of 40*l.* 10*s.* is parcel as aforesaid, became due and payable to the plaintiff under and by virtue of the said indenture in the declaration mentioned, after the death of the said Edward Boodle, to wit, for the period which elapsed between the 29th of September, 1841, and the 29th of September, 1842. That if the defendant had not paid to the said Ann Boodle and John Pickstock the said sum of 40*l.* 10*s.* parcel, &c., they would have proceeded to eject and expel the defendant from the said parcel of the said demised premises, and to have duly put the law in force against the defendant, pursuant to the said notice; wherefore the defendant, afterwards, and after the commencement of the suit, and before this day, to wit, &c., did necessarily and unavoidably pay to the said Ann Boodle and John Pickstock the sum of 40*l.* 10*s.* as he lawfully might for the cause aforesaid. And the defendant further says that the plaintiff never had anything in the said parcel of the said demised premises, except as appears in this plea. Verification.

Demurrer, assigning for cause, that the plea altogether denied the title of the plaintiff, and amounted to a special plea of nil habuit in tenementis as to parcel of the premises, which the defendant was estopped from pleading; that it contravened the rule of law, that a tenant shall not dispute his landlord's title; and also the rule of law, that a man shall not contradict his own indenture. Joinder in demurrer.

Channell, Serjt., (*Willes* was with him) to support the

demurrer. The plea is bad in substance. This is either a special plea of nil habuit in tenementis, or a plea of eviction. It sets up a conveyance by the plaintiff of part of the premises demised, before the lease to the defendant was made, and its object is to shew, that the plaintiff had no interest in this part of the premises at the time of the demise, she having previously parted with her interest therein. This would have been a plea of nil habuit, &c., but for what follows. The plea goes on to state, that the plaintiff was in possession of the premises at the time of the demise, and that after the commencement of the suit, the defendant received notice from the devisees of Edward Boodle to pay over to them a just proportion of the rent already due and unpaid; and it then alleges payment of that amount. *Sapsford v. Fletcher* (a) will probably be cited on the other side. In that case, however, the land, at the time when the lease was made, was subject to a charge upon it, the ground rent due to the Duke of Portland, the superior landlord. Here there was no such prior charge. So in *Taylor v. Zamira* (b), it was held to be a good plea, that before the lessor had anything in the land, a termor granted an annuity, which afterwards became in arrear, and that the tenant paid to the grantee, under a threat of distress, the amount of the rent due to the landlord. In that case *Gibbs*, C. J., says (c), "If he (the tenant) had not paid that burthen, the liability of the land to it would have been no plea; for then it would amount only to the plea of nil habuit in tenementis; but when he adds that the annuitant threatened to exercise his right of distress, we think the two facts combined together do constitute a complete defence." In *Pope v. Biggs* (d), which will also be relied upon for the defendant, the rents paid over to the mortgagee, in respect of arrears of interest due, accrued under leases granted by the mortgagor after the mortgage. In that case *Parke*, J., observed (e), "It is undoubtedly true that a plea of nil

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(a) 4 T. R. 511.

(b) 6 Taunt. 524; See S. C. 2 4 M. & R. 193. Marsh. 220.

(c) Id. p. 528.

(d) 9 B. & C. 245; See S. C.

(e) Id. p. 256.

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habuit in tenementis is no answer to an action against the tenant at the suit of his landlord; but eviction by title paramount is a good plea to an action for rent, which accrued due subsequently to such eviction, and the defence in this case bears more resemblance to the latter plea." If this plea therefore, be meant as a plea of eviction, it is bad, because it does not state that the eviction took place before the rent sued for became due. *Com. Dig.* tit. "*Pleader*" 2 *W.* 50. He was then stopped by the Court.

Talfourd, Serjt. (*E. V. Williams* with him), *contra*. This is not a plea of nil habuit in tenementis, but a special plea of payment, setting out circumstances which show that the money was paid under compulsion, and on behalf of the landlord. In *Pope v. Biggs* (a), the circumstances were nearly similar. *Johnson v. Jones* (b) very closely approaches the present case. That was an action of replevin, in which the tenant pleaded payment of the rent to a mortgagee, to whom the premises had been mortgaged in fee before the demise to the plaintiff, and who had demanded payment from the plaintiff, and threatened "to put the law in force" in case of refusal. The Court of Queen's Bench held that this was, in substance, a plea of payment, and not of nil habuit in tenementis, nor of eviction. The only difference between that case and the present is, that in *Johnson v. Jones*, there was a mortgage, while here there was an absolute conveyance of the premises, before the demise to the tenant. All the cases which have been referred to on the other side, were cited in *Johnson v. Jones*, but Lord *Denman*, C. J. said (c), "This is a plea, not of nil habuit in tenementis, but of payment; and the defect of the lessor's title is shewn only as a medium of proof that the payment was for the benefit, and by reason of the default, of the lessor himself. *Sapsford v. Fletcher* and *Taylor v. Zamira*, are, therefore, authorities

(a) 9 B. & C. 245; See S. C. 1 P. & D. 651.
4 M. & R. 193. (c) *Id.* p. 813.
(b) 9 A. & E. 809; See S. C.

to shew that the plea is in substance good." This is a stronger case than *Johnson v. Jones*, where there was a mere vague threat to "put the law in force;" but here eviction was threatened; and it is submitted that there was such a compulsion as entitles the defendant to plead payment of 42*l.* 10*s.* to the devisees of Edward Boodle, as an answer to that part of the plaintiff's demand.

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Channell, Serjt., in reply. *Johnson v. Jones* is quite distinguishable from the present case. In that, as in all the cases referred to, there was a money charge on the land prior to the demise; but here at the time of the demise, there was no charge at all upon the land. Supposing the plea to be looked at as a plea of payment, it is still bad; because it does not appear that the payment was compulsory in point of law; and even if the defendant had paid a debt due from the plaintiff to a third person, who had a charge upon the land for that debt, the payment would still be open to the objection, that it was not made before action brought. This is not a plea of payment in accord and satisfaction. To make the plea good, the defendant ought to have alleged that the payment of 42*l.* 10*s.* made to the devisees of Edward Boodle, was accepted by the plaintiff by way of satisfaction for that amount.

TINDAL, C. J.—It appears to me that this plea cannot be sustained, either as a plea of eviction, or expulsion of the tenant, or even as a plea of payment of a portion of the rent, by the compulsion of some person authorized to receive it as a charge upon the land. Taking it as a plea of eviction, the tenant is bound to shew that the eviction took place before the rent became due; but so far from that being the case, it appears from the plea that the eviction was not until after action brought. Then, the next question is, is this a plea of payment? In *Supsford v. Fletcher* (a), there was a ground rent issuing out of the

(a) 4 T. R. 511.

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land, for which a distress might have been made on the tenant, if the rent had not been paid, and the tenant, therefore, might treat such a payment as one made on behalf of the landlord. Upon the same principle, in *Pope v. Biggs* (a) and *Johnson v. Jones* (b), payment of the money due for rent in arrear, in satisfaction of interest due to a mortgagee, was held to be a good payment of rent to the mortgagor. But what are the circumstances of the present case? The plaintiff is said to have conveyed away her interest in a moiety of the premises, before the demise, to Edward Boodle, in right of whom his devisees step forward, and claim a portion of the rent. That being the case, on what ground is it that the sum of 40*l.* 10*s.* is set up as the proportional part of the rent due to them, rather than any other sum? The rent cannot be apportioned in this case, as the parties are not before the Court. Who can say that Mrs. Boodle and Mr. Pickstock will be satisfied with the apportionment which the defendant has made? The first difficulty, therefore, is, that we should be called upon to say that 40*l.* 10*s.* is the right sum to be apportioned. Then, there is another difficulty; it does not appear that this sum is a charge upon the land at all. If the devisees choose, they may have the land back again. It seems to me, therefore, that, taking this plea either as a plea of eviction, or as a plea of payment, it is not an answer to that part of the plaintiff's demand, to which it professes to apply.

COLTMAN, J.—I am of the same opinion, upon the grounds which have been stated by the Lord Chief Justice. Treating the plea as one of eviction, it is an eviction subsequent to the time when the rent became due. It does not appear that there was any notice to the defendant to pay the devisees, until after the rent fell due. As a plea of eviction, therefore, it is bad. Neither do I consider it a

(a) 9 B. & C. 245; See S. C. 4 M. & R. 193.

(b) 9 A. & E. 809; See S. C. 1 P. & D. 651.

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COPLEY and Another v. MEDEIROS.

The provisions of the stat. 2 Wm. 4, c. 39, s. 4, apply to cases where a defendant is arrested under a Judge's order, pursuant to stat. 1 & 2 Vict. c. 110, s. 3.

Where, therefore, the copy of a capias issued under the latter act, omitted to state the form of action mentioned in the original writ, the Court set aside the service of the copy, although the bail bond properly recited the form of action.

SIR T. WILDE, Serjt., had obtained a rule calling upon the plaintiff to shew cause why the service of the capias which had been issued in this case, should not be set aside, and why the bail bond given to the sheriff should not be delivered up to the defendant to be cancelled; and also why so much of an order of *Maule*, J., as directed the defendant to pay to the plaintiff the costs of a similar application before the learned Judge at Chambers, should not be rescinded. The capias had been issued under a Judge's order, pursuant to the stat. 1 & 2 Vict. c. 110, s. 3, but the copy of the writ served on the defendant omitted to state the form of action, which was mentioned in the writ itself, and in the bail bond.

Channell, Serjt., shewed cause. The stat. 1 & 2 Vict. c. 110, s. 3, does not require a copy of the capias to be served on the defendant, and the cases which have arisen upon the Uniformity of Process Act, 2 Wm. 4, c. 39, s. 4, are therefore distinguishable from the present. Immaterial variances have been amended by the Courts in construing the former statute; *Plock v. Pacheco* (a), *Richards v. Dispraile* (b), *Bilton v. Clapperton* (c). The defendant could not have been misled by the omission, as the bail bond states the form of action.

Sir T. Wilde, Serjt., in support of the rule. The stat. 2 Wm. 4, c. 39, is still in force, so far as it has not been repealed by the stat. 1 & 2 Vict. c. 110. The latter statute, abolishing arrest upon mesne process generally, permits a defendant to be arrested under a Judge's order in certain

(a) 9 M. & W. 342; See S. C. Dowl. 384, N. S.

1 Dowl. 380, N. S.

(c) 9 M. & W. 473; S. C. 1

(b) 9 M. & W. 459; S. C. 1 Dowl. 386, N. S.

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Durham, divers large quantities, to wit, five hundred tons of coal for the port of London, to wit, on board a certain ship or vessel, to wit, a vessel called the *Mentor*; and which said ship or vessel so containing the said coals, afterwards, to wit, on the day and year aforesaid, sailed with the said coals on her voyage from Hartlepool aforesaid, to London aforesaid, whereof the defendants then had notice; but the defendants, not regarding the provisions of the said statute in such case made and provided, did not send by the General Post Office, on the day on which the said ship or vessel, containing the said coals, sailed on her said voyage, nor give to the ship-master of the said ship or vessel, before the same sailed on her said voyage, a certificate signed by the defendants, containing the day of the month and year of such loading, the name of the master of the said ship, and of the said ship, and the quantity of tons so delivered as aforesaid, and the usual names of the several and respective collieries out of which the said coals were wrought and gotten, and the price paid by the master for each and every sort of coals, that the defendants, so delivering coals as aforesaid, then sold and loaded on board the said ship or vessel; contrary to the form of the statute in such case made and provided: whereby and by force of the said statute, the defendants then forfeited for their said offence, the sum of 100*l.* &c.

To this, the defendants pleaded the general issue; and upon the trial at the Durham Summer Assizes, 1843, before *Cresswell*, J., the following certificate was put in evidence: "Register, tons, 285; No. of men, 8; cleared for London, Hartlepool, 13th of March, 1843. We have shipped on board the *Mentor*, of Newcastle, Alexander Hughes, Master, 330 tons of 20 cwt. of Barrett's Wallsend coals, at twenty-seven shillings and sixpence per chaldron, of 53 cwt. Matthewson and Son." It was proved, that one Barrett had formerly been in possession of a colliery, which now belonged to a person of the name of Coxhoe, and out of which the coals in question were wrought; and

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The objections taken at the trial, and upon which it was contended, by the defendants, that the plaintiff ought to have been nonsuited, were two: first, that there was no proof given at the trial, that the coals had been sold, and unless delivered on sale, it was contended, that the penalty for non-delivery of the certificate, did not apply; and, secondly, that the certificate which was actually delivered, shewed a sufficient compliance with the requisites of the statute.

As to the first of the defendants' objections, we think it is a sufficient answer thereto, that there is no distinct allegation in the declaration, that the coals, or any part of them on board this vessel, had been actually sold. That part of the declaration, on which the defendants relied as their ground for supporting this objection, did, by no means, as it appears to us, amount to an averment that the coals were sold, but is merely a description of the certificate as set out in the schedule to the act, by reason of the non-delivery of which the plaintiff contends the penalty was incurred. The declaration charges the defendants with not delivering the certificate, containing "the price of the coals sold;" but this is no allegation that in point of fact there were coals on board which had been actually sold. If, therefore, there was no such allegation in the declaration, it is unnecessary to discuss as a ground of nonsuit, whether such allegation ought to have been proved: if it was an essential allegation, and is omitted, it may be a ground of arresting the judgment, but not of nonsuit. And for the same reason, it is unnecessary to decide whether the provisions of the statute are confined to the case of coals sold, or extend to all coals delivered on board, for the purpose of being taken to London, whether upon sale or otherwise.

As to the second ground taken for entering a nonsuit, namely, that the certificate delivered was a sufficient compliance with the statute, we cannot accede to that proposition. The objection was, that the certificate did not

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Judgment having been entered up for the defendants' costs, against husband and wife, in an action for a libel against the wife, in which the verdict had passed for the defendants, a ca. sa. issued against the husband alone, and afterwards a second writ of ca. sa. against both the plaintiffs. The husband having been taken in execution under the first writ, after the second had issued, was discharged therefrom by an order of the Insolvent Court, and the wife was subsequently arrested under the second writ, but discharged out of custody by a Judge's order. The Court refused on motion, to set aside the second writ, on the ground that it had been improperly issued.

NEWTON et ux v. ROWE and Another.

A VERDICT having passed for the defendants in this case, which was an action for a libel against Mrs. Newton, judgment was entered up against the plaintiffs for the defendants' costs. On the 15th of June, 1843, a ca. sa. issued into Surrey, directing the sheriff to take the body of the male plaintiff, and on the 7th of July, a second writ of ca. sa. issued into Gloucestershire against both the plaintiffs. On the 27th of July, Mr. Newton was taken in execution under the first writ. On the 4th of November, he was discharged from custody thereon by an order of the Insolvent Court, and on the 15th of February, 1844, the second writ of ca. sa. was delivered to the sheriff of Gloucestershire, who arrested Mrs. Newton under it. Upon an application to Mr. Justice *Cresswell*, at Chambers, Mrs. Newton was discharged out of custody, but the learned Judge refused to set aside the writ.

Mr. *Newton*, in person, now moved to set aside the writ of ca. sa. issued on the 7th of July, and the execution thereof. He contended that all the authorities shewed that a wife, during coverture, could not be taken in execution, unless for debts contracted while she was a feme sole, and cited 3 *Bl. Com.* 414. [*Erskine, J.*, referred to *Finch v. Duddin et ux (a)*.] He admitted that in actions ex delicto, where the wife had taken an active part in committing the tort, she might be taken in execution; but here, for all that had appeared, Mrs. Newton was a passive, and it might be an unwilling, party to the proceedings. He cited also *Raynes v. Jones*, (b) *Hoad v. Matthews (c)*, and *Com. Dig.* tit. "*Baron and Feme*," (H). The writ itself, therefore, and the execution of the writ, were erroneous. [*Tindal, C. J.*—If there be error in the proceedings, the matter must be

(a) 2 *Strange*, 1237.

Dowl. 373, N. S.

(b) 9 *M. & W.* 104; *S. C.* 1

(c) 2 *Dowl.* 149.

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as to 5*l.*, payment of that sum into Court. The plaintiff traversed the first two pleas, and took the 5*l.* out of Court.

At the trial before *Wightman*, J., at the York Summer Assizes, 1842, a verdict was found for the defendant, leave being reserved to the plaintiff to move to enter a verdict for 2*s.* 6*d.*, if the Court should be of opinion that, upon the pleadings in this case, the plaintiff could recover interest.

A rule having been obtained in Michaelmas Term to enter the verdict for the plaintiff, pursuant to the leave reserved ;

Byles, Serjt., now shewed cause. The plaintiff was not entitled, upon the form of the pleadings in this case, to recover any interest. The commencement of the first plea applies only to the debts, and notwithstanding the subsequent introduction of matter which amounts to an answer to both debts and damages, the rules of pleading confine the answer of the defendant to the cause of action stated in the commencement of the plea ; *Henry v. Earl (a)*, *Earl of Manchester v. Vale (b)*, *Gray v. Pindar (c)*. Interest upon a note is not a debt, but only damages. In *Watkins v. Morgan (d)*, the defendant covenanted to pay the plaintiff 270*l.* on the 15th of December, with interest up to that time ; and upon his default, an action of debt was brought by the plaintiff, who laid his damages at 10*l.* It was ruled by *Littledale*, J., that the plaintiff could only recover the principal sum, with interest up to the 15th of December, and 10*l.* more ; although the interest up to the time of the action amounted to a larger sum. [*Cresswell*, J.—That is an authority against you. It appears from that case, that interest, payable under a contract, is a debt, and where a note is made payable with interest, the interest is a debt.]

Sir *T. Wilde*, Serjt., who appeared to support the rule, was not called upon.

(a) 8 M. & W. 228 ; See S. C.
 9 Dowl. 725.
 (b) 1 Wms. Saund. 28, n. (3).

(c) 2 B. & P. 427.
 (d) 6 C. & P. 661.

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30th of November, 1843, not "as of Michaelmas Term," and the writ of fi. fa. thereon was executed on the 6th of December. The defendant became a bankrupt on the 18th of December, and assignees were appointed under the fiat on the 3rd of January, 1844. The assignees did not become acquainted with the alleged irregularity in the judgment until the 16th of January.

Sir *T. Wilde*, Serjt., shewed cause. The authority given by the warrant of attorney has been, in substance, acted upon. By Reg. Gen., Hil. Term, 4 Wm. 4, r. 3, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in Term or Vacation, when signed, and shall not have relation to any other day." Judgment, therefore, never can now be entered up "as of a Term" (*a*). [*Tindal*, C. J.—It might have been signed in Term]. Formerly, a judgment "as of a Term" was a judgment of the Term generally, and might have been signed in Vacation; and the question is, whether the New Rules make any difference in this respect? There can be no doubt that it was the intention of the parties, by using the words "as of a Term," to allow judgment to be signed in Vacation. Secondly, the application is out of time, *Weedon v. Garcia* (*b*).

Channell, Serjt., contrà. The rule must be made absolute. *Cobbold v. Chilver* (*c*) is in point. There the defendant had executed a warrant of attorney, dated the 15th of February, 1840, whereby he authorized three attorneys by name, or any other attorney of the Court of Common Pleas, to appear for him "as of last Hilary Term, next Easter Term, or any subsequent Term;" and to suffer judgment to be entered up against him at the suit of the plaintiff

(*a*) See however the case of *Jurvis v. South*, ante, vol. 1, p. 962; not then reported.

(*b*) 2 Dowl. 64, N. S.

(*c*) 4 Scott, N. R. 678; S. C. 4 M. & G. 62; 1 Dowl. 726, N. S.

for 500*l*. Judgment was signed on this warrant of attorney on the 8th of September, 1841, and this Court held, that as there was no provision in the warrant of attorney for signing judgment in Vacation, the judgment was irregular. The authority of that case was admitted in *Coulson v. Clutterbuck* (a), and *Rayment v. Smith*, (b), and has been acted upon by Mr. Justice Williams in a recent case in the Bail Court, of *Bird v. Manning* (c). Then, the judgment not being regular, it is submitted that there has been no waiver of the irregularity. Admitting that the defendant himself might not have been able to take advantage of the irregularity in the judgment, the rights of third parties, the assignees, have intervened; and the Court will not allow them to be prejudiced by any delay arising out of the want of accurate information, *Webber v. Hutchins* (d).

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TINDAL, C. J.—If it were necessary to decide this case upon the point raised in *Cobbold v. Chilver*, and the other cases cited by my brother Channell, I should have found no little difficulty in distinguishing those cases from the present; but it appears to me, that in this instance the parties were bound to come with due diligence to the Court, and within such time, that the interests of other persons might not be affected by the delay. It may be very true that by the intervention of the bankruptcy, these parties are not placed in a more favourable position; but we must also look at the position of the plaintiff. The levy took place on the 6th of December, and the plaintiff is not called upon to refund the money until the 15th of April. In the meanwhile he may have paid away the money to some one else, or have entered into various engagements upon the faith of being possessed of it. The case of *Skyring v. Greenwood* (e) bears upon the present point. There, Cox and Greenwood, who were army agents, had given credit

(a) 2 Dowl. 391, N. S.

(b) *Ante*, vol. 1, p. 166.

(c) Hilary Term, 1844.

(d) 8 M. & W. 319; See S. C.

1 Dowl. 95, N. S.

(e) 4 B. & C. 281; See S. C. 6 D. & R. 401

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in an account to an officer in the army, who kept money with them, for certain allowances erroneously supposed to have been granted to officers in his situation. The defendants were informed of the error in 1816, but they did not communicate this information to the officer till 1821. The Court held that it was not competent to the defendants to retain any sums of money on account of the sums for which they had given him credit, and which they had allowed him to consider his own for so long a period of time. Applying the principle of that case to the present, I think that when the levy took place on the 6th of December, and no application is made to the Court till the 15th of April, a motion to set aside the judgment for irregularity comes too late. There is no fraud or oppression alleged on the part of the plaintiff, but a mere non-compliance with a very technical rule. The defendant must have known very well what the circumstances were, under which he was deprived of his goods on the 6th of December; but between that time and the day of his bankruptcy, the 18th of December, he takes no steps to set aside the proceedings. I am not prepared to say, that this delay of the defendant was not in itself enough to deprive him, and if him, then his assignees, who claim under him, of any right to make this application. But further, the assignees were appointed on the 3rd of January, and allowing them a reasonable time to investigate matters, it seems to me, that they might have applied much earlier than they have done. It is certain, at all events, that on the 16th of January, they had made inquiries, because a correspondence then took place, which shewed that they knew that the judgment had been signed on a warrant of attorney. There were then fifteen days left in Hilary Term, and the whole of the Vacation, when they might have gone before a Judge at Chambers any day, but they stood still and did nothing. It seems to me that *Weedon v. Garcia* (a) is quite in point, and that this rule must be discharged.

(a) 2 Dowl. 64, N. S.

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RAMM v. DUNCOMB.

Where a notice to plead omitted to state in how many days the defendant was to plead, and the plaintiff signed judgment for want of a plea; the Court refused to set aside the judgment for irregularity, the defendant having allowed eighteen days to elapse between the service of the notice, and the date of his application to the Court.

DOWLING, Serjt., moved (a) to set aside, as irregular, an interlocutory judgment which had been signed in this case, and the subsequent proceedings thereon. It did not appear when the judgment was signed, but the notice to plead was served on the 20th of April, and judgment had been signed for want of a plea. The notice to plead did not state in how many days the defendant was to plead.

TINDAL, C. J.—You ought to have come earlier. This is the last day of the Term, and you have allowed eighteen days to elapse since the service of the notice to plead. A defendant may, in such a case, apply to the Court quia timet.

Rule refused.

(a) On the last day of Term.

BIRCH v. LEAKE.

In an action for work and labour, a plea of the defendant's coverture, at the time of the contract, is an issuable plea.

A RULE having been obtained to set aside a judgment, which had been signed against the defendant in the above cause, which was an action for work and labour, for pleading a non-issuable plea, she being under terms to plead issuably;

Talfourd, Serjt., shewed cause, and submitted, that the plea in question, which was, that the defendant, at the time of the contract, was a feme covert, was not a plea to the merits, within the meaning of the terms to plead issuably. He cited *Conwell v. Thomas* (a), and *Staples v. Holdsworth* (b).

(a) 2 W. Bl. 724.

(b) 4 Bing. N. C. 144; See S. C. 5 Scott, 432; 6 Dowl. 196.

COURT OF QUEEN'S BENCH.

Trinity Term.

IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

REGULA GENERALIS.

DIRECTIONS TO THE TAXING OFFICERS, IN LIEU OF THE DIRECTIONS OF HILARY VACATION, 4 WM. 4, 1834, SO FAR AS RELATE TO THE SCALE OF COSTS IN CASES WHERE THE SUM RECOVERED, &c., DOES NOT EXCEED 20*l*.

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“That in all actions of assumpsit, debt, or covenant, where the sum recovered, or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l*., without costs; the costs both of the plaintiff and defendant, and as well between attorney and client, as party and party, except as hereinafter excepted, shall be taxed according to the reduced scale hereunto annexed.

“Provided that, in case of trial before a Judge in one of the superior Courts, or Judge of Assize, if the Judge shall certify on the postea, that the cause was proper to be tried before him, and not before a sheriff or Judge of an inferior Court, the costs shall be taxed upon the usual scale.

“Where, in like actions, the sum indorsed on the summons shall be more than 20*l*., but the plaintiff fails to recover more than that sum, and the Judge does not certify as aforesaid; the plaintiff's costs, as well between party and party, as also between attorney and client, shall be taxed as upon a writ of trial before a Judge of a Court of Record, where attorneys are not allowed to act as advocates, as

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and Another
v.
F. HARRISON
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warrant bore date, the 30th of April, 1841, and authorized the attorneys therein named, "to appear in the said Court of Queen's Bench, for us, the said F. H., and G. H. H., and each of us, jointly and severally, as of this present Easter Term, Trinity Term next, or any other subsequent Term; and then and there to receive a declaration, &c., and, thereupon, to confess the said action, or else to suffer judgment by nil dicit, or otherwise, to pass against us, or either of us, in the said action, and to be forthwith entered up against us, or either of us, of record of the same Court." Default having been made in the payment of the annuity, the plaintiffs signed judgment on the 7th of December, 1841, "as of Michaelmas Term, 1841," which was entered according to the usual course of practice, in the book of judgments of that Term. On the 8th of December, in the same year, a writ of *capias ad satisfaciendum* was issued for the amount of the arrears of annuity, and costs of the judgment and execution. Application was then made by the defendant, F. Harrison, to set aside the annuity, the indenture and warrant of attorney given for securing the same, and the judgment entered up thereon, and all subsequent proceedings; and a rule nisi was accordingly granted on the 19th of January, 1842. This rule was on hearing, discharged with costs, and a sum of 13*l.* 15*s.* 2*d.*, which had been paid into Court, by the defendants, under a Judge's order, was ordered to be paid to the plaintiffs. Further arrears of the annuity having accrued due, the plaintiffs, on the 29th of May, 1843, issued another writ of *ca. sa.*, under which the defendant, F. Harrison, was arrested on the 18th of May, in the present year, from which arrest he now sought to be discharged; on the ground, that according to the recent decisions on the subject, the judgment was improperly signed in Vacation. It was submitted, that this objection however valid it might be, came too late. That conceding the judgment to be improperly signed, it, at most, amounted only to an irregularity, *Bate v. Lawrence* (a); and this irre-

(a) *Ante*, p. 83.

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that when a party is in execution on a judgment which is a nullity, there is no limitation of time within which he must apply for his discharge. But this is a peculiar case; for here the defendant has been already before the Court, and must be presumed to have then come prepared to object on every ground in his power. Now although it is true that the motion on that occasion was merely to set aside the annuity, yet we find that it was also to set aside the warrant of attorney and judgment thereon. At that time, the party either brought the objection now urged before the Court, or he did not. If he did not, he did not avail himself of all the grounds of objection, which he might have done at the time, and it is now too late to bring them forward. If he did, as the Court then discharged the rule, I must assume that in so doing, they held the judgment to be regular; and I cannot now review their decision. The rule must therefore be discharged, and with costs.

Rule discharged, with costs.

WRIGHT v. BURROUGHES and Others.

The defendants had obtained a rule for costs of the day for not proceeding to trial, on which the Master had indorsed his allocatur. The Court discharged a subsequent rule nisi, calling on the plaintiff to pay the amount so taxed.

THE usual rule had been obtained in this case for costs of the day, for not proceeding to trial according to notice, and the Master had taxed the costs, and indorsed his allocatur for 38*l*. on the back of the rule. The defendant had then taken out a rule, calling on the plaintiff to pay these costs, but being unable to serve it, he had taken out another rule, calling on the plaintiff to pay the costs, and also the costs of the two rules, on an affidavit that plaintiff had been keeping out of the way to avoid service of the former rule.

Dowdeswell shewed cause. These two latter rules were unnecessary, and the plaintiff should not be called upon to pay the costs of them. The rule for the costs of the day, when it had the Master's allocatur indorsed on it, was a

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Lush, in support of the rule. It does not appear in the report of *Hodson v. Patterson*, that the attention of the Court was called to the peculiar terms of the rule, which are, "that the attorneys of both parties shall attend the Master, and he shall examine the matter, and tax the defendant his costs, for that the plaintiff hath not proceeded to trial pursuant to his notice, which costs, when taxed, shall be paid by the plaintiff, *if it shall appear to the Master that costs ought to be paid*" (a). It is clear, that upon principle, this rule stands in the same light, as an order of reference. After the allowance of the Master, the party might have the same objections to make, as in the case of an award.

WIGHTMAN, J.—I think this rule must be discharged. The case in the Court of Common Pleas is precisely in point, and I discharge this rule on the ground of that decision. I refrain from expressing any opinion as to the question, whether the defendant is at liberty to issue execution.

Rule discharged.

(a) Chitty's Prac. Forms, p. 616, 5th ed.

Doe dem. HUNCHECORNE v. ROE.

In ejectment, a consent rule, not entitled in the cause, was delivered with a plea properly entitled. The plaintiff having signed judgment against the casual ejector, The Court refused to set aside the judgment as irregular.

LUSH applied to set aside the judgment, which had been signed against the casual ejector in the above action, and that the tenant in possession should have leave to amend the consent rule, by adding the title of the cause thereto. The tenant in possession had delivered a plea within the proper time, but the consent rule, which was annexed to the plea, was not entitled at all; and it was supposed that on this ground the plaintiff had chosen to treat it as irregular, and had, therefore, signed judgment. The

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BENNETT v. SIMMONS.

A rule to set aside a judgment irregularly signed, and to sign judgment anew, at the instance of the party signing it, is only a rule nisi in the first instance.

UNTHANK applied for leave on the part of the plaintiff to set aside a judgment which he had signed on a warrant of attorney given by the defendant in the above cause, and to sign judgment anew. The reason for making this application was, that the warrant of attorney authorized judgment to be signed "as of a Term," and the judgment had been signed in Vacation, which according to the recent decisions on the subject, rendered it irregular (*a*).

COLERIDGE, J.—It must be a rule nisi only; as the defendant may be able to shew that the judgment already signed has been satisfied.

Rule nisi.

(*a*) See *Bate v. Lawrence*, *ante*, p. 83, and the cases there cited.

REGINA v. FULLER.

On return to a habeas corpus, it appeared that the prisoner was in custody by virtue of a warrant of commitment on an adjudication of two magistrates, on a complaint in writing, under the 11 Geo. 2, c. 19, s. 4, for fraudulent removal of goods; but it no where appeared, on the face of the adjudication, or of the commitment, that the complaint, in respect of which the magistrates proceeded, was made in writing by the landlord, his bailiff, servant, or agent: *Held*, a fatal defect, and that the prisoner was entitled to be discharged.

THE return to a habeas corpus, stated the following warrant of commitment:—

"Huntingdonshire, to wit. To the constables of Huntingdon, and also to the keeper of the House of Correction at Great Stukeley, in the county of Huntingdon. Whereas John Fuller, late of Fenstanton, in the said county, horse dealer, was by an order, dated the 29th of April, 1844, under the hands and seals of Thomas Skeels Fryer, Esq., and the Reverend Edward Martin Peck, clerk, two of her Majesty's justices of the peace for the county of Huntingdon, (residing near the place where the goods and chattels hereinafter mentioned were removed, and not being

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complaint, in respect of which the magistrates proceeded to adjudicate, was made by the landlord or his bailiff, &c., in writing.

Peck, clerk, two of her Majesty's justices of the peace, in and for the said county of Huntingdon, residing near the place where the goods and chattels hereinafter mentioned, were removed, and not being interested in the lands or tenements, from whence the same were removed, whose hands and seals are hereunto subscribed and set. Whereas John Fuller, late of Fenstanton, in the county of Huntingdon, hath been duly charged, in writing, before T. S. Fryer, Esq., and the Rev. J. Linton, clerk, two of her Majesty's justices of the peace for the said county, residing near the place where the goods and chattels hereinafter mentioned, were removed, and not being interested in the lands or tenements from whence the same were removed, with having, on or about the 3rd day of April, 1844, fraudulently and clandestinely removed and conveyed away his goods and chattels, to wit, not exceeding the value of 50*l.* from his dwelling-house and premises in the parish of Fenstanton, in the county of Huntingdon, to certain premises in the parish of Cottenham, in the county of Cambridge, to prevent J. Beck, of Fenstanton, aforesaid, gent., from distraining the said goods and chattels, for arrears of rent due to him for the said dwelling-house and premises, to the 25th of March last past: And whereas the said T. S. Fryer, Esq., and the Rev. J. Linton, clerk, as such

justices, having summoned the said J. Fuller, to appear before two of her Majesty's justices of the peace for the said county; and we, the undersigned justices, being two of her Majesty's justices of the peace for the said county, having duly examined the fact, and all proper witnesses upon oath; and it appearing and being fully proved upon oath before us, that the said John Fuller did, on the said 3rd day of April, in the year aforesaid, so fraudulently and clandestinely remove, and convey away the said goods and chattels as aforesaid, being of the value of 10*l.*, to prevent the said J. Beck from distraining the said goods and chattels, for the said arrears of rent, contrary to the statute in such case made and provided: We, the said undersigned justices, do, therefore, this 29th day of April, 1844, determine and adjudge that the said J. Fuller is guilty of the offence with which he is charged as aforesaid, and he is convicted thereof: And we do hereby order and adjudge him to pay the sum of 20*l.*, being double the value of the said goods and chattels, to the said J. Beck, or to T. Alderton, his bailiff, servant, or agent, on or before the 14th day of May, in the year aforesaid. Given under our hands and seals, at St. Ives, the 29th of April, 1844. T. S. Fryer, (L. S.) E. M. Peck, (L. S.)"

See an amended form in Burn's Justice, vol. 1, p. 1157, 28th ed

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form in which such instruments are ordinarily drawn up ; but it often happens that a defective form is in use for a considerable period of time before the defect in it is discovered. I think this objection a fatal one, and the prisoner must, consequently, be discharged.

Prisoner discharged.

CRUTCHLEY v. The LONDON and BIRMINGHAM RAILWAY
COMPANY.

It is neither usual nor reasonable, on granting a plaintiff time to reply, to impose on him the terms of replying issuably.

THE plaintiff, in this case, having been ruled to reply, took out a summons for time, on the hearing of which at Chambers, a Judge's order was obtained in Term time, for a week's further time " the plaintiff replying issuably ;" the plaintiff's solicitor before and at the time of the making the order, objecting to be put under these terms. On a former day, in this Term, *Fitzherbert* had obtained a rule, calling on the defendants to shew cause, why so much of the said order as required the plaintiff to reply issuably, should not be rescinded.

Bovill shewed cause against this rule ; both parties agreeing that it should not be argued as a question for rescinding an order, but as an original application ; and that the question to be discussed was, whether such terms were reasonable.

WIGHTMAN, J.—I am now to consider it as an open question, whether or not it is reasonable, under the circumstances, to impose upon the plaintiff the terms of replying issuably ; and I am of opinion that it is not. It is quite new to me, to hear of such terms being imposed, and I have never yet known an instance of the kind. It is perfectly usual to put defendants under terms to plead issuably, for a defendant being allowed to put several pleas on the

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“Parts of Lindsey, Lincolnshire, to wit. To the constable of Scamblesby, in the said parts, and to the keeper of the House of Correction at Louth, in the said parts. Whereas information and complaint upon oath hath been made before us, John Fytche, and William Teale Wilfitt, Esquires, two of her Majesty’s justices of the peace in and for the said parts, by Thomas Reading Grantham against William Jacklin, late of, &c., servant in husbandry to the said T. R. Grantham, that he the said W. Jacklin, having contracted to serve the said T. R. Grantham in the business of husbandry until May day next, hath, during his servitude, been guilty of divers misdemeanors, miscarriages, and other ill behaviour towards him, the said T. R. Grantham, and particularly on the night of the 21st of March last, when he did purloin a quantity of barley to give to the horses under his care, contrary to his master’s express commands. And whereas the said W. Jacklin, in pursuance of our warrant for that purpose, had appeared before us to answer the said complaint, but hath not proved that he is not guilty of the said complaint and charge. And whereas, in pursuance of the statutes in that case made and provided, we have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint; and upon due consideration had thereof, have adjudged and determined that he the said W. Jacklin did contract as aforesaid, and hath, in his said service and employment, been guilty of divers misdemeanors, misconduct, and ill behaviour towards the said T. R. Grantham, in that he, the said W. Jacklin, did, on the night of the 21st of March last, purloin a quantity of barley to give to the horses under his care, contrary to the express commands of the said T. R. Grantham, and we do, therefore, hereby convict him, the said W. Jacklin, of the said offence, in pursuance of the statutes in that case made and provided. These are, therefore, to command you, &c.” [Adjudication of imprisonment in the House of Correction for two months,

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duty in respect of the contract into which the prisoner had entered with his master; and the statute gives the magistrates no authority where the misconduct arises from a violation of duties, which the servant owes, independent of his contract.

COLERIDGE, J.—Proceedings of this kind should not be dealt with captiously. At the same time, a statute of this nature cannot give power in a case of misconduct, which is not reasonably within the execution of the contract, in respect of which the magistrates have jurisdiction. Otherwise, the magistrates might inflict a heavier or slighter punishment than the party is liable to by law. It is, therefore, important that the contract should be correctly stated, in order that the Court may see, whether the misconduct complained of, is in violation of its terms. I do not however rely upon the fact, that the offence for which the prisoner is committed, is not shewn to be in breach of his contract; because, taking it any way, I think that it sufficiently appears that a substantive felony has been committed: and that being so, the prisoner is entitled to have his case considered by a jury, and the magistrates had no jurisdiction. The rule must, therefore, be made absolute in the alternative.

Rule absolute (a).

(a) It was drawn up, by consent, for the discharge of the prisoner.

HARRIS v. PECK.

Where a warrant of attorney was directed to J. W. C. and H. J., "attorneys of his Majesty's Court of King's Bench," authorizing them "to appear for the defendant, as of," &c., and "there to receive a declaration for him;" and thereupon, "to suffer judgment &c., to be forthwith entered up against him of record of the said Court;" and the defeazance provided that it should not be necessary to revive the judgment after the lapse of a year and a day, "any rule, &c., in the said Court of King's Bench, to the contrary notwithstanding:" *Held*, that an appearance was properly entered for the defendant in the Court of King's Bench, no other Court being mentioned in the warrant of attorney.

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warrant to enter an appearance in any one of the superior Courts, and has, therefore, been sufficiently complied with, by entering an appearance in this. It cannot be disputed that the warrant authorizes a judgment in this Court ; and if so, then it shall be taken to authorize all the prior proceedings necessary for signing judgment ; and the former portion of the warrant is mere surplusage.

Butt, in support of the rule. The terms of an instrument of this nature, are to be construed strictly. There is no power here to enter an appearance in this Court. Till that step has been taken, all subsequent proceedings are void.

WIGHTMAN, J.—I entertained a strong opinion, when this motion was first made, that the objection was a groundless one ; and now upon looking at the terms of the warrant, I am satisfied that it is so. There is only one Court mentioned throughout the whole of the instrument, and the appearance has been entered in that Court. The rule must, therefore, be discharged.

Rule discharged (*a*).

(*a*) The rule was discharged to set aside the same judgment, "with costs;" but on the ground on which occasion, the present objection was not taken. that there had been a former application to a Judge at Chambers,

PAGE v. SOUTH.

Where a warrant of attorney authorized an appearance to *BUTT* had obtained a rule, calling on the plaintiff to shew cause, why the appearance, declaration, judgment be entered in an action for 200*l*., and judgment to be suffered in the same action for the said, (leaving a blank) ; and an appearance was accordingly entered, and judgment signed for 200*l*., together with the costs of the suit, amounting to 3*l*. 10*s*. ; and afterwards a scire facias was sued out to revive the judgment, and judgment obtained thereon by default, and the defendant, who was in custody, was charged in execution, under a habeas corpus ad satisfaciendum at the suit of the plaintiff: *Held*, on motion to set aside the judgment and to discharge the defendant out of custody ; that the judgment for costs was not authorized by the warrant of attorney, and was therefore a nullity, and must be set aside in toto ; and that the Court could not amend it, by striking out that part which referred to the costs, without a rule to amend.

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1839; and also 6*l.* 4*s.*, and interest at 4*l.* per cent. from 19th December, 1843."

Lush shewed cause. The objection on which the defendant relies is, that the warrant does not authorize a judgment for damages. But nominal damages are a legal incident to every debt recovered, and the plaintiff is entitled to costs under the Statute of Gloucester. The intention of the parties, which is to be collected from the whole of the instrument taken together, *Farnell v. Adams* (a), clearly is, that a judgment should be entered up with all its usual legal incidents. The defendant, however, is precluded from taking the objection now. He should have pleaded to the scire facias, or objected to the judgment originally obtained; and not having done so, he is estopped from objecting to the fresh judgment on the scire facias. Besides, even supposing the objection could prevail, the judgment would still remain good as to the debt, and the Court would not disturb that part of it. The Court, in such a case, would act upon the same principle as governs a Court of error, when it reverses, as it frequently does, a judgment as to part, *Bourne v. Gatcliffe* (b).

Butt, in support of the rule. In order to entitle to costs, the party must recover damages. Here, there was no power to sign judgment for damages; and the judgment must strictly follow the terms of the warrant; *Harris v. Wade* (c). In *Paris v. Wilkinson* (d), it was held, that where a plaintiff entered up judgment in debt on a mutuatus, on a warrant of attorney to enter up judgment in debt on a bond, the Court would set it aside as irregular. The judgment in debt may be for the debt only, without damages; therefore, this judgment was a nullity, and the

(a) 1 Dowl. 869, N. S.

(c) 1 Chit. Rep. 322.

(b) In Dom. Proc. Not yet reported.

(d) 8 Term Rep. 153.

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the 16th of February, instead of the 14th; and the date of the return day, as the 19th of February, instead of the 16th or 21st; though through what cause these errors had arisen, did not appear.

H. S. Wilde, having obtained a rule to set aside the writ of trial and all subsequent proceedings (a);

Thomas now shewed cause, and was proceeding to use an affidavit, when

H. S. Wilde objected that the jurat of it was defective. It was as follows: "Sworn at the Central Criminal in the City of London, this 18th day of April, 1844, before me, *J. Williams*." It should appear where the affidavit is sworn. Here the description is unintelligible, and not being sworn in Court or at Chambers, it does not follow that the signature thereto attached, is the signature of the learned Judge of the same name.

COLERIDGE, J.—(after conferring with the Judges in full Court.) I do not think this a sufficient objection to the affidavit. It is entitled in this Court, and the jurat states that it is sworn in the City of London. Then comes the name of a learned Judge of this Court, before whom it was sworn, and as he would have authority to take it any where, I think there is no sufficient objection to its being read.

Thomas. The plaintiff had a right to alter the date of the return day upon re-sealing it. At any rate, this is a mere irregularity, and the defendant, if seeking to avail himself of it, should have applied sooner.

H. S. Wilde, in support of the rule. The plaintiff perhaps might, by order of the Court, amend his writ of

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teste and return, which he had over the first writ, and he does not apply to the Judge to order the issuing of another writ, because he has already determined that the issue is one fit to be tried by the sheriff. But in the present case, the plaintiff has taken upon him to alter an existing and operative writ in a material part,—a writ in which, at that time, the defendant had an interest equal to his own,—which had passed out of the plaintiff's control, and was properly in the custody of the sheriff. I think the plaintiff had no right to do this, and that resealing the writ did not cure the objection. It is quite clear that the proper course was to have applied to a Judge, for leave to alter the return day, and although in the present instance the alteration was perfectly harmless; yet to permit this unauthorized dealing with a writ in operation, may lead to serious inconvenience in many supposable future cases. I think, however, that this amounted only to an irregularity, and that the sheriff had still jurisdiction to try the case, when he did. The defendant therefore was bound to apply promptly; but this occurring in February, and being then known by him, he made an ineffectual application to a Judge in Chambers which failed through his own want of preparation, and did not come to the Court till late in Easter Term. He has, therefore, clearly waived it.

The second objection is that of a variance between the writ, and the setting it out in the issue, both as to the teste and return. It was not at all clearly explained how this had arisen; it is, however, no more than an irregularity; and if the defendant had moved to set aside the proceedings in consequence of it, in due time, the Court, on the prayer of the plaintiff, would no doubt have amended it; but as I have before observed, the defendant has come so late, that all mere irregularities are waived. The rule, therefore, on both points will be discharged, and with costs.

Rule discharged, with costs.

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the plaintiff consenting to stay all proceedings in the action for a certain space of time.

Accordingly, in pursuance of this arrangement, the plaintiff's attorneys, on the 1st of August, wrote the following letter to the sheriff's officers, countermanding the execution of the writ.

"In the Queen's Bench.

" *Howard v. Cauty.*

"We hereby withdraw the writ of *capias ad satisfaciendum* issued in this cause, and request you not to execute the same.

"BECK and FLOWER.

"1st August, 1843."

"To the Sheriff of Middlesex,
and to Messrs. Selby and Mott, his officers."

The writ was accordingly never attempted to be executed; but it did not appear that it was taken out of the sheriff's office. On the 22nd of September, the defendant was arrested by the same officers on another writ of *ca. sa.* issued at the suit of one Sir Robert Gill, Knt., and ultimately committed to the custody of the keeper of the Queen's prison. The defendant, in the meanwhile, not having complied with his undertaking, the plaintiff sued out a writ of *testatum fieri facias* directed to the sheriff of Merionethshire, under which certain goods of the defendant were levied on the 30th of September, and a portion of the debt realized. On the 14th day of May, 1844, the plaintiff lodged a writ of *habeas corpus ad satisfaciendum* with the keeper of the Queen's prison, for the purpose of charging the defendant in execution in this suit, and on the 23rd of May, the defendant was accordingly brought up and charged in execution. The defendant had ruled the sheriff to return the first writ of *ca. sa.* which he had accordingly done on the 22nd of May, with this indorsement, "I humbly certify and return, that by the instructions of the within named Frank Howard, I forbore the execution

of this writ. The answer of John Kennedy Hooper, Esq., Samuel Pilcher, Esq., sheriff."

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Corrie had obtained a rule, calling upon the plaintiff to shew cause why the writ of habeas corpus ad satisfaciendum, and all subsequent proceedings should not be set aside, and why defendant should not be discharged out of custody, as to the execution at the suit of the plaintiff, and why the plaintiff should not pay the costs of the application.

Unthank now shewed cause. The question is, whether the defendant was ever in custody under the first writ of ca. sa. at the suit of the plaintiff; and it is submitted that he never was. The plaintiff had withdrawn that writ by the direction which he gave on the 1st of August, through his attorney, to the sheriff's officer to that effect. *Barber v. St. Quintin* (a) shews, that a sheriff to whom a writ of ca. sa. is delivered, is bound to obey the directions of the plaintiff respecting it; and if he arrests the defendant after notice from the plaintiff not to execute it, he is liable in trespass. And *Hunt v. Hooper* (b) shews that a writ is so far withdrawn under such circumstances, that the sheriff is bound to give priority in execution to a subsequent writ. It is true, that in the case of *Arundel v. Chitty* (c), the plaintiff directed the sheriff not to execute a writ of ca. sa. which he had lodged with him, unless defendant should be in his custody; and although the defendant came into his custody wrongfully, and in a sense which the plaintiff did not mean, the writ was held to attach: but in the present case there was no such direction at all; the order here was positive not to execute the writ. As to the objection, that part of the debt has been satisfied by the fieri facias, and that the writ of habeas corpus ad satisfaciendum does not mention that fact, the case of *Green v. Foster* (d) shews that it is not necessary that it should.

(a) *Ante*, vol. 1, p. 542; See
S. C. 12 M. & W. 441.

(b) *Ante*, vol. 1, p. 626.

(c) 1 Dowl. 499.

(d) 2 Dowl. 191.

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Corrie, in support of the rule. It is submitted, that the defendant was in the custody of the sheriff under the first writ of *ca. sa.*, at the suit of the plaintiff. The alleged withdrawal of the writ is a mere notice to the sheriff's officer not to execute the warrant, and the writ itself still remains in its original force, in the hands of the sheriff. A party taken by him into custody, is in his custody under all the writs against that party in the sheriff's office. The warrant is unnecessary, except for the purpose of apprehending the party. It is by virtue of the writ that the sheriff has him in custody. The present direction, therefore, was no direction to the sheriff as to the writ, but simply a direction to the officer as to the warrant. [*Wightman*, J.—Is not a notice to the officer in a case like the present, a notice to the sheriff?] I apprehend, not. In *Barker v. St. Quintin* (a) the notice not to execute the writ would seem to have been given to the sheriff. [*Wightman*, J.—Do you mean to contend, that if the sheriff had arrested the defendant in the present case, after the notice to his officer, he would not have been liable to an action of trespass at the suit of the defendant?] The sheriff might, perhaps, have issued another warrant, and so have legally arrested the defendant. The officer is merely an agent to arrest, and not an agent to receive notices.

WIGHTMAN, J.—That perhaps may be so in ordinary cases; but here the notice not to execute the warrant was given to the same officers who took the defendant into custody at the suit of the third party. They had been named in the first instance, by the plaintiff's attorneys, to execute the writ. It is quite clear, therefore, that the defendant never was in execution at the plaintiff's suit under the first writ. That writ has, consequently, never been executed; and not having been executed, the subsequent process has been regular. This rule must, therefore, be discharged.

Rule discharged, without costs.

(a) *Ante*, vol. 1, p. 542; See S. C. 12 M. & W. 441.

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action, as also of an unsuccessful attempt on the part of Evans to set aside the judgment, still remained unpaid. A rule similar in effect to the present one had been taken out before Mr. Justice *Erskine* at Chambers, who, after taking time to consider, had discharged it; but the present application was made with that learned Judge's permission. Besides the above mentioned property, Mrs. Bowen also left lands in Glamorganshire; and in 1829, the said T. Snead had brought an action of ejectment against the present lessor of the plaintiff, to recover possession of them, but elected to be nonsuited; and in the same year brought another action for the same lands, but did not proceed to trial pursuant to notice, whereupon the then defendant, Evans, obtained an order for costs of the day. Snead then obtained a rule nisi to set aside the order, which was discharged with costs; since which no further step had been taken with regard to the Glamorganshire property.

E. V. Williams shewed cause against the present rule (a). If this ejectment is to be stayed till the costs of the action in 1843 be paid, then the costs of the former action respecting the Glamorganshire property in 1829, should also be taken into account, and in that case, there would be a large balance in favour of the present lessor of the plaintiff. The defendants claim as representatives of T. Snead, their father, and though the property is not the same, the title through which it is claimed is the same. If he were alive, and making the present application, it is submitted the answer would be good as against him; it ought, therefore, to be good as against the defendants, who claim under the same title. *Doe dem. Rees v. Thomas* (b). [*Wightman, J.*—The difficulty is, that you should have made this answer to the ejectment in 1843, and that not doing so, may be construed as a waiver. It is extremely inconvenient to go back beyond the costs of one ejectment.

(a) In Easter Term.

(b) 4 A. & E. 348.

The particular circumstances of this case, however, may take it out of what I conceive to be a useful general rule. Have you any case where a party has been allowed to set up a claim to costs on which he might have stayed proceedings on a former action? The affidavits, at least, should state some reason for not doing so.] From the facts as detailed in the affidavits, it is clear that there was no opportunity for making such an application, as the lessor of the plaintiff was ignorant of the existence of the action.

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Bramwell, in support of the rule. If this objection to the present application is tenable, it would have been good ground for staying proceedings when the present lessor of the plaintiff was sued by the now defendants. He should have applied to stay proceedings in the action in 1843. He must have had notice of the proceedings, unless the Court will suppose an action of ejectment can be brought without notice to the defendant. His laches must have been great, when the Court refused to set aside the judgment against him, and his laches can afford no answer on the present occasion. [*Wightman*, J.—It seems clear that the omission to defend the ejectment in 1843, was entirely through mistake.] It by no means follows that the title of the defendants is the same as that of T. Snead in 1829; they have in addition a title by estoppel. There is no authority to shew that where a party has two titles, and litigates one, he may be compelled to stay proceedings until he pays costs incurred in a former litigation of the other. It would create endless confusion, if parties were permitted to enter into the question of the payments of costs of former actions, incurred at such a distant period of time. He cited also *Doe dem. Thomas v. Shadwell* (a).

Cur. adv. vult.

1844.
 Doe dem.
 EVANS
 v.
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 and Others.

WIGHTMAN, J.—Having perused the affidavits, I am of opinion that this rule should be discharged, unless the defendants undertake not to set up the title which was in contest before. If, therefore, they will give an undertaking not to avail themselves of the title of T. Snead, save by estoppel, the rule will be absolute ; otherwise, it will be discharged without costs. (a)

Rule accordingly.

(a) In consequence of a diffi- undertaking, the rule was subse-
 culty in settling the terms of the quently discharged.

WHITEHEAD v. HARRISON (a).

(*In the full Court.*)

In detinue
 on a common
 bailment, a
 plea traversing
 the bailment,
 is bad on de-
 murrer.

DETINUE. The declaration alleged that the plaintiff heretofore, &c., delivered to the defendant a certain indenture of the plaintiff, that is to say, a certain indenture bearing date, &c., and purporting to be made between, &c. of great value, to wit, of the value of, &c., to be re-delivered by the defendant to the plaintiff, when the defendant should be thereunto afterwards requested. Yet the defendant, although he was afterwards, to wit, on, &c., requested by the plaintiff so to do, hath not as yet delivered the said indenture, &c.

The defendant pleaded amongst other pleas, the following :

That the plaintiff did not deliver to the defendant the indenture in the declaration mentioned, to be delivered by the defendant to the plaintiff, when he the defendant should be thereunto, afterwards, requested, modo et formâ, &c.

(a) See this case, *ante*, vol. 1, p. 706.

To which the plaintiff demurred, and the defendant joined in demurrer.

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Addison, in support of the demurrer. In detinue on a common bailment, it is the wrongful detainer which is the real gist of the action; and it is not founded on the contract to re-deliver, which is indeed an immaterial averment, and mere matter of inducement, *Bateman v. Elman* (a), *Gledstane v. Hewitt* (b), *Broadbent v. Ledward* (c), *Bro. Abr.* tit. "*Detinue des Biens*," and *Walker v. Jones* (d). [*Patteson*, J.—Suppose the defendant were to traverse that the indenture was the property of the plaintiff, could the plaintiff rely, by way of estoppel, on the delivery to the defendant as alleged; and if not, is not that allowing the defendant to give a defence in evidence, which you deny is the subject-matter of a plea?] It is submitted, that the mode of delivery is immaterial, the detainer being the real gist of the action. [*Patteson*, J.—Suppose there were no allegation of property in the plaintiff?] Then he could not recover, as he would fail to show, on the face of the declaration, any right to maintain the action. The property in the plaintiff, and the wrongful detainer by the defendant, are the two material propositions on which the action is founded; but they need not be proved with the same strictness as in an action on the contract, *Broadbent v. Ledward* (e), *Jones v. Dowle* (f); which shews that this is an action in the nature of a tort, and, therefore, that the terms of the delivery are mere matter of inducement, and not traversable. Mr. Baron *Bayley*, in the case of *Gledstane v. Hewitt* (g), says, "The authorities seem to shew that though a bailment is stated in the declaration, it is not an essential

(a) Cro. Eliz. 866.

(e) 11 A. & E. 209; See S. C.

(b) 1 Cr. & J. 565; See S. C. 1 3 P. & D. 45.
 Tyr. 445; 1 Price's P. C. 71.

(f) 9 M. & W. 19; See S. C.

(c) 11 A. & E. 209; See S. C. 1 Dowl. 391, N. S.

3 P. & D. 45. (g) 1 Cr. & J. 573; See S. C.

(d) 2 Cr. & M. 672. 1 Tyr. 445; 1 Price's P. C. 71.

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part of the declaration, and the plaintiff is not tied down to the species of bailment stated in the declaration, and if he can make out that he was entitled to the possession and re-delivery of the goods, and that the defendant wrongfully withheld them, he will be entitled to recover." *Mills v. Graham* (a) may be cited on the other side: but there was no decision on this point in that case. It shews, however, that detinue may be brought against an infant, which could not be the case if the action were founded on the contract.

J. Henderson, contra. This is the only plea by which the defendant can raise the proposed defence, under the New Rules. Formerly, the matter would have been put in issue under the plea of non detinet, *Mills v. Graham*. There are two forms of declaring in detinue, the one in detinue sur trover; the other, as in the present case, on a bailment. The old precedents, it seems, had no allegation that the goods were the property of the plaintiff; and the defendant was liable in this action, on a bailment, upon proof that he had received them from the plaintiff; except where the Court decreed relief by garnishment, *Rast. Ent.* pp. 210, 211, *Brown's Ent.* p. 147; *Roll. Abr.* p. 606; as in *Rich v. Aldred* (b). There *Holt*, C. J., held, that if A. bail the goods of C. to B., and C. bring detinue against B. for them, B. may plead the bailment to him by A., to be re-delivered to A., and so bring in A. as garnishee, to interplead with C. It, therefore, seems clear, that the bailment is not put in issue by a plea denying the property in the plaintiff. It is also clear, from the case of *Mills v. Graham*, that the plea of non detinet would have put the bailment in issue, before the New Rules; and those Rules take away no defence which before existed; but only regulate the mode in which the issue shall be raised. In some cases, no doubt, a special traverse would be desirable; but here the plea, in effect, shews, that the goods were not delivered

(a) 1 N. R. 140.

(b) 6 Mod. 216.

to the defendant on the terms mentioned in the declaration. Suppose the indenture had been delivered on a bailment to re-deliver in six months, or on payment of 50*l.*; would not a traverse of these statements be material? But when the time had elapsed, or the money been paid, it would then become a bailment to re-deliver on request. The present question has nothing to do with the property. It is like the case of goods sold and delivered, where it is not necessary to insert any allegation that the goods are the property of the plaintiff. The case of *Lane v. Tewson* (a), is not against the view here contended for. That only decides that a defence of lien may be given in evidence under a plea denying the plaintiff's property. *Gledstane v. Hewitt* (b) is not in point; or if it is, so far it is not law. *Walker v. Jones* (c) was decided in the same Term, in which the New Rules were made, and, therefore, most probably did not come within their operation. So also, *Bateman v. Elman* (d) was before the New Rules; and neither of these decisions go further than that of *Gledstane v. Hewitt*.

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Addison, in reply. The New Rules make no alteration in the materiality of averments in pleading, [*Coleridge*, J.—Suppose the plaintiff's only title is that of the bailment?] It cannot affect the question of the wrongful detention, which is the only subject of this action, in what manner the defendant became enabled to detain the goods. [*Patteson*, J.—The question after all comes to this; whether the plaintiff's title arises from the property in the goods, or from the contract of bailment. Suppose the old form of declaring were used, leaving out the allegation of property in the plaintiff.] The plaintiff would still have to prove his right to have the goods re-delivered to him, *Phillips v. Robinson* (e), *Mason v. Farnell* (f).

Cur. adv. vult.

(a) 12 A. & E. 116, n.; See S. C. 1 G. & D. 584.

(d) Cro. Eliz. 866.

(b) 1 Cr. & J. 565; See S. C.

(e) 4 Bing. 106; See S. C. 12 Moore, 308.

1 Tyr. 445; 1 Price's P. C. 71.

(f) *Ante*, vol. 1, p. 576.

(c) 2 Cr. & M. 672.

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 WHITEHEAD
 v.
 HARRISON.

LORD DENMAN, C. J., now delivered the judgment of the Court.—[After shortly stating the pleadings, his Lordship proceeded thus.] There is no doubt that before the New Rules, a common bailment was not traversable, as was decided in the case of *Gledstane v. Hewitt* (a), and in that of *Walker v. Jones* (b); and the only question is, whether the New Rule, that the plea of non detinet shall operate as a simple denial of the detainer, makes any difference. On the part of the defendant it was argued, that the property of the plaintiff could not be traversed, as the words “of the plaintiff,” are not material, and are not to be found in the entries in the older books; and as the case of the plaintiff might merely consist of some attempt to prove an actual contract, there is no other way of putting the plaintiff upon proof of his case: that it would be most unjust therefore to compel the defendant by a special traverse, to take upon himself the onus of proof, instead of being able in this, as in all other cases, to put the plaintiff on proof of his right. The plaintiff, on the other hand, relies on the authorities, which shew that notwithstanding the averment of the bailment, he is at liberty to prove any other mode by which the goods may have come into the hands of the defendant, and, consequently, that the bailment is not traversable. A recent decision in the Exchequer (c), which has been cited at the Bar, favours this view of the case; and however hard it may appear upon the defendant, we feel ourselves bound by the authorities to hold that a plea traversing a common bailment is bad. It may seem, that some alteration ought to be made in the declaration, and that the plaintiff ought to be bound to state the bailment truly, and then it would be traversable; but until such alteration is made by the proper authorities, we feel bound to act on the decided cases; and our judgment will, therefore, be for the plaintiff.

Judgment for the Plaintiff.

(a) 1 Cr. & J. 565: See S. C.

1 Tyr. 445; 1 Price's P. C. 41.

(b) 2 Cr. & M. 672.

(c) *Mason v. Farnell*, ante, vol.

1, p. 576.

1844.

ALDERSON v. THOMAS WAISTELL and HENRY WAISTELL.

THIS was a rule calling on the plaintiff to shew cause why the Master should not review his taxation in the above cause. The action was trespass for assault and battery, and the defendant, Henry Waistell, who was a minor, had appeared by his next friend, Thomas Waistell, the other defendant. The defendants had jointly pleaded not guilty, and the defendant, Thomas Waistell, had also pleaded by himself two special pleas, which it is unnecessary to particularize. On the trial, the jury found a verdict of guilty, with 10*l.* damages against the defendant, Thomas Waistell, and not guilty against Henry Waistell. Upon the taxation before the Master, he allowed the plaintiff his full costs of suit, amounting to 123*l.* 11*s.* 1*d.*; but to the defendant, Henry Waistell, he only allowed 23*l.* 7*s.* 2*d.* for his costs. In this sum there was only a guinea allowed for the attorney's expenses of attending at the trial at Liverpool, and only the expenses of three sheets of the brief, the same brief including the defence of both the defendants, and he refused to allow any mileage for the attorney's expenses in travelling from Richmond, in Yorkshire, where the assault took place, and near to which he resided, to Liverpool. He had allowed the moiety of the expenses of one only of two witnesses, who were subpoenaed to prove, amongst other facts applicable to the joint defence, a conversation with the plaintiff, in which he spoke of the defendant, Henry, as not having been concerned in the assault.

Cowling shewed cause. In strictness, the defendant, Henry Waistell, is not entitled to any costs at all. Being

An action of trespass for assault and battery was brought against a father and son. The son who was a minor, appeared by his father as guardian, and pleaded not guilty. The father appeared by attorney, and pleaded two special pleas. A verdict having passed against the father, and in favour of the son; upon motion to review the taxation of costs: it appeared, that the Master had allowed to the son only a guinea for the attorney's expenses for attending the trial at Liverpool, and only the expenses of three sheets of the brief, the same brief including the defence of both the defendants, and the Master had refused to allow any mileage for the attorney's expenses in travelling from Richmond in Yorkshire,

where the assault took place, and near to which he resided, to Liverpool. The Master had also refused to allow the moiety of a witness's expenses, who was called for the joint defence, as well as incidentally for that of the son: The Court ordered a review of the taxation, except as to the expenses of the brief.

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a minor he is not liable for costs, and according to the recent work of Mr. *Dax*, on the *Practice of the Court of Exchequer*, p. 230, "to entitle one of two defendants in a joint action, to his aliquot portion of costs, he must satisfy the Master that he is liable to the attorney for the same, (citing *Bartholomew v. Stevens*, 7 *Dmol.* 808,) and to do this, he must shew a joint retainer and a joint liability." [*Wightman*, J.—The Master, however, has allowed him some costs; the question therefore is, whether he has allowed him sufficient. Upon what principle has the Master proceeded in this taxation?] The rule upon which the Master has proceeded is to be found in *Gambrell v. Earl Falmouth* (a), "that the successful defendant is to be allowed all his separate costs, and *primâ facie* an aliquot part of the joint costs, unless the Master is satisfied that some smaller proportion should be allowed by reason of any special circumstances." This rule is recognised and confirmed by the subsequent case of *Norman v. Climençon* (b). Here the Master has found that there were special circumstances. With respect to the expenses of the brief, he has found that only three sheets of it applied to the defendant, Henry Waistell's case, the rest applying exclusively to that of the other defendant. In both the cases cited, the defendants pleaded the same pleas. As to the disallowance of the expenses of a certain witness on the part of the defendants, the Master thought that the evidence of one only applied to the case of Henry Waistell, as well as to that of Thomas, and that all the rest applied solely to the case of Thomas. As to the moiety of the expenses of the attorney, the Master considered the substantial case was against the defendant Thomas, and that the other defendant scarcely required an attorney at all. [*Wightman*, J.—Suppose the defendant Henry Waistell had appeared alone, would he not have been entitled to expenses of an

(a) 5 A. & E. 403; See S. C. 6 N. & M. 859.

(b) 1 Dowl. 718, N. S.; See S. C. 4 M. & G. 283; 4 Scott, N. R. 735.

attorney?]

The 3 & 4 Wm. 4, c. 42, s. 32, only gives the successful defendant his reasonable costs; it is submitted, that in this case he has had his reasonable costs.

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 and Another.

Bliss, in support of the rule. As to the witness, whose expenses the Master has disallowed to the defendant Henry; it may be true, that the chief effect of his evidence was in favour of the defendant Thomas; because, in point of fact, there was no case at all against Henry. But the defendant Henry is entitled to a moiety of his expenses, if his testimony would have exculpated him from a share in the transaction. This witness could have proved conversations with the plaintiff, shewing that the defendant Henry had taken no part in the assault; and if a plaintiff chooses to place a perfect stranger in the position of a defendant, for the purpose, it may be, of depriving the real defendant of the benefit of his testimony, he must be prepared, in the event of not succeeding in the action, to pay the expenses of such witnesses as that defendant may call to prove his defence. As respects the moiety of the attorney's expenses, we are clearly entitled to that. The attorney comes from Richmond, in Yorkshire, where this quarrel took place, to Liverpool, where this action is tried, and attends equally for the defence of both defendants.

WIGHTMAN, J.—It seems to me, that the matter should be referred back to the Master with respect to the expenses of the attorney, and the costs of the witness. I do not say how much he should allow in respect of these expenses. I do not say he should allow half of the witness's expenses, nor need he allow half of the attorney's expenses. *Primâ facie*, however, the successful defendant is entitled to the half. I will not interfere with the expenses of the brief.

Rule absolute accordingly.

1844.

Ex parte LEWIS.

Where an attorney had died intestate, with whom the applicant was serving his articles of clerkship, and his widow was a minor, and no letters of administration were likely to be taken out; the Court granted a rule calling on the widow to shew cause, why the applicant, who was of age, should not be at liberty to re-article himself for the remainder of the term which he had to serve.

MR. LEWIS had been articulated to an attorney of the name of Chilton, in May, 1839, for the term of five years; and his articles of clerkship had been regularly assigned in February, 1843, to an attorney of the name of Jones, who was carrying on business in partnership with a Mr. Morris. Mr. Lewis continued regularly to serve Jones till his death in May last, since which time he had continued to serve Mr. Morris, his partner. Jones's widow was a minor, and upon inquiry, there appeared at present, no probability, that any one would take out administration to his effects.

Merewether now moved, that Mr. Lewis, having served with Mr. Morris, should be admitted on such service; or at all events, that as he was of age, he might be permitted to bind himself for the remainder of the term he had to serve, to any attorney he might think fit.

WILLIAMS, J.—As his service is incomplete, it is impossible that I should grant the first part of your motion. He may, however, have a rule, calling on the widow of Mr. Jones, to shew cause, why he should not be at liberty to enter into articles with Mr. Morris, or any other attorney who is willing to take him for the remainder of the term he ought to serve.

Rule accordingly.

BADHAM v. BATEMAN.

Where a writ of distringas is returnable on a day out of Term, application to set it aside may be made more than eight days after execution, as it cannot be amended.

SMYTHIES having obtained a rule nisi for setting aside a writ of distringas for irregularity, with costs, on the ground that it was returnable on a day out of Term,

Price shewed cause. The motion is made too late, being on the eleventh day after execution, if the writ is only irregular, for then the motion must be made within eight days, *Alexander v. Smith* (a); and if void, it cannot be set aside for irregularity within the terms of this rule.

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 {
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Smythies, in support of the rule. In the case cited, the irregularity was the absence of indorsement, which does not make the writ void by rule, M. T., 3 Wm. 4, r. 5, but is an amendable defect; here the writ is void, *Kenworthy v. Peppiat* (b); and proceedings founded on it might be set aside after eight days, and, therefore, the writ itself. In the case just cited, the writ was set aside as void, on a rule in the terms of this.

WIGHTMAN, J.—The writ cannot be amended, and it is not the less irregular, because the defect is vital.

Rule absolute.

(a) *Ante*, vol. 1, p. 467; See S. C. 12 M. & W. 30.

(b) 4 B. & A. 288.

WILLIAMS and Others, Executors of JONES v. DOWNMAN.

(*In the full Court.*)

THIS was a rule (a) calling on the above-named plaintiffs to shew cause, why all proceedings on a writ of scire facias which had been sued out by them in the above action,

After judgment of nonsuit, on a rule for a new trial coming on to be argued, the parties, at the suggestion of the Court, agreed to state

(a) The rule nisi was obtained in the Bail Court, before *Wightman, J.*

the facts in a special case, with liberty to turn it into a special verdict, with a view to the ulterior remedy of a writ of error. The Court, after judgment for the plaintiff in the Court below, and a writ of error sued out, stayed execution without requiring bail in error.

Quære, if the Court have any power to stay proceedings without bail in error, under the 6 Geo. 4, c. 96; except in cases of judgment by default.

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should not be stayed under the following circumstances :— Jones, the original plaintiff, had brought an action in the Court of Exchequer, against the defendant on a guarantee, in which the question was, whether the defendant had promised in his individual character, or simply as agent. In that action Jones recovered a verdict subject to a motion for a nonsuit, which, on argument, was made absolute. He then brought a similar action in this Court, and was nonsuited. He afterwards moved for a new trial. On the rule nisi being argued, the Court suggested, that the facts should be turned into a special case, with liberty to either party to turn it into a special verdict, in order that, as the question was one of some difficulty, the parties might take any ulterior proceedings they might think proper. This was done accordingly, the defendant waiving any advantage he had, by the judgment of nonsuit in his favour. The Court afterwards gave judgment for Jones, and set aside the judgment of nonsuit. A special verdict was then stated, and Jones signed judgment thereon in December, 1842. In the early part of the same month, and before judgment was signed, the defendant below sued out a writ of error, and took out a summons before a Judge at Chambers to stay proceedings, without putting in bail in error. Pending this summons, and before the allowance of the writ of error, Jones died, in the month of July, 1843. It appeared that the motion before the learned Judge was mainly rested on the ground of the inability of the plaintiff in error to obtain bail; but his Lordship not being satisfied on the affidavits, that such was the case, dismissed the summons; as also a subsequent summons, which was taken out in the following month, for the same purpose. Jones left a will, by which he appointed three executors, one of whom was a minor. The will was proved by the two executors at the time, and by the minor on his coming of age in May, 1843; but no step had been taken by them to make themselves parties to the record, till in the Vacation after last Hilary Term, when they sued out a writ of scire facias to

revive the judgment. In consequence of the death of Jones, before the allowance of the writ of error, the plaintiff in error had not taken any further step ; but upon the present writ of scire facias being sued out, he had obtained a second writ of error, returnable on the last day of the present Term. This writ had been duly allowed, and notice thereof served on the opposite parties.

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Evans, with whom was *J. Henderson*, shewed cause. There are three objections to the present motion. First, the plaintiff in error should have proceeded with his writ. It was not abated by the death of Jones. After allowing it to rest without taking any steps for so long a period, he cannot now come to the Court for relief. Secondly, he has made two similar motions to a Judge at Chambers, and each time the summons has been dismissed. Thirdly, the Court has no power to entertain the motion. The statutes, 3 Jac. 1, c. 8, and the 16 & 17 Car. 2, c. 8, are imperative that no execution shall be stayed by a writ of error, unless bail is put in ; and the authorities shew that the Court is strict in its practice in this respect, *Abraham v. Pugh* (a), and the cases there referred to. The statute 6 Geo. 4, c. 96, which gives the Court a discretion as to requiring bail, is an act in aid of the former statutes, and therefore will be construed to extend only to such cases as do not come within the former enactments ; for it contains no words of repeal, *Collins v. Gwynne* (b). It consequently only applies to cases of judgment by default.

Chilton, with whom was *E. V. Williams*, in support of the rule. The plaintiff in error was not bound to proceed with his writ. After the death of Jones, he might believe that no one would proceed to enforce the judgment. Besides, he gave up his advantage in the Court below, of the judgment of nonsuit in his favour, for the express purpose that

(a) 5 B. & A. 903.

(b) 9 Bing. 544 ; See S. C. 2 M. & Sc. 640.

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the judgment of a Court of error might be obtained ; and he could not well proceed with the writ, after the death of Jones, as there was no one on whom to serve proceedings, the authority of Jones's attorney having ceased with the former's death. The applications to a Judge at Chambers were on a different ground ; and his Lordship made no rule, but simply declined to interfere in the manner suggested. It is doubtful whether the allowance of a writ of error can be pleaded to a scire facias, *Snook v. Mattock* (a). The statute 6 Geo. 4, c. 96, gives the Court in express terms a discretion, in requiring bail ; and though that act does not in so many words repeal such portions of the former statutes as are inconsistent with it ; it must be held to have virtually that effect, according to the ordinary construction to be put upon subsequent statutes on the same subject matter. However, it is not necessary to rely on the statute 6 Geo. 4, c. 96, in support of this rule ; as the Court has power of itself to stay proceedings, where they see that justice will be promoted by so doing, and that the parties are acting against good faith.

Cur. adv. vult.

PATTESON, J., now delivered the judgment of the Court. [After briefly stating the facts of the case, his Lordship proceeded thus.]—It was argued on the part of the executors, that the Court had no power to stay execution after verdict, in consequence of a writ of error, unless bail were put in and perfected ; the statutes of James the First and of Charles the Second, giving them no discretion in the matter, and the statute of George the Fourth only applying, as it was contended, to the case of judgment by default. On the other hand, it was contended by the plaintiff in error, that the statute 6 Geo. 4, c. 96, in effect gives the Court power, in all cases, to stay execution without bail in error. We purposely abstain from giving an opinion

(a) 5 A. & E. 239 ; See S. C. 6 N & M. 783.

on this point; for we think that the arrangement which was made at the suggestion of the Court, involved almost a certainty that a writ of error would be brought by the unsuccessful party, whatever might be the decision of this Court on the special case; and that it is contrary to the spirit of that arrangement, that bail in error should be required. The very object of that arrangement was to obtain the opinion of a Court of error, and the plaintiff in error gave up his advantage on the faith of that arrangement. Therefore, under the special circumstances of this case, without reference to the statute, we hold that we have power to stay the proceedings without bail.

The only question that remains is, whether the affidavits shew sufficient grounds for so doing. We are of opinion, on the whole, that they do, and that this rule must be made absolute without costs, the plaintiff in error undertaking to proceed with all due diligence.

Rule absolute, accordingly.

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WOODWARD and Another v. MEREDITH.

THE plaintiffs had brought an action of assumpsit against the defendant as acceptor of two bills of exchange, which was tried at Guildhall, at the sittings in Michaelmas Term, 1842, when a verdict was found for the plaintiffs, and judgment signed on the 9th of January, 1843, for 68*l.* 6*s.*, being the amount of the damages and costs. On the 30th of November, 1842, a fiat in bankruptcy had issued against the defendant, under which he was duly adjudged a bankrupt. On the 10th of January, 1843, the plaintiffs proved under the fiat, for the amount of the debt only in

The plaintiffs recovered a verdict in an action of assumpsit on two bills of exchange for 68*l.* 6*s.* for damages and costs. After a fiat in bankruptcy had issued against the defendant, they signed judgment. Afterwards, they proved

under the commission for the amount of the bills of exchange, the commissioners refusing to allow them to prove for the costs. The bankrupt never obtained his certificate, nor was any dividend paid under the commission. The plaintiffs subsequently sued out a writ of scire facias to revive the judgment, solely with the view of recovering the costs. The Court granted a rule to stay proceedings on the scire facias.

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the action, the commissioner having refused to allow them to prove for the costs, on the ground that the judgment was signed after the date of the fiat, and therefore, not legally provable against the estate of the bankrupt. On the 9th of February, in the present year, the plaintiffs sued out a writ of scire facias to revive the judgment in the said action, solely with the view, as it was sworn, of recovering the costs; a copy of the writ was served the same day on the defendant. The defendant had not obtained his certificate, nor had any dividend been declared under the commission.

Gray had obtained a rule, (*a*) calling on the plaintiffs to shew cause why all proceedings on the writ of scire facias issued in the above cause, and on the judgment therein mentioned, should not be stayed; and why the plaintiffs should not pay the costs of, and occasioned by, this application.

J. Henderson shewed cause (*b*). The scire facias is only brought to recover the costs in the action, the commissioner having refused to allow the plaintiffs to prove for them under the commission. The first objection to this application is, that it is made too late. The copy of the writ of scire facias was served, on the defendant, on the 9th of February, and no objection is made till the present month of April. This proceeding by the plaintiff, if erroneous, is but an irregularity, and the defendant should have applied to a Judge at Chambers to set it aside. Besides, the defendant has not put himself in a position to make this objection, as he has not appeared to the scire facias. This application is under the 59th section of the 6 Geo. 4, c. 16, and attempts to treat the claim under a commission of bankruptcy as a total relinquishment of the plaintiffs' debt, although no dividend has been paid, and the plaintiffs have, con-

(*a*) In Easter Term.

(*b*) In the same Term.

sequently, derived no benefit therefrom. If, indeed, a dividend had been paid, that might have been a satisfaction in part, and the defendant might so have pleaded it in bar to the present action. If the objection raised by this motion be a defence at all, it would form an answer to the *scire facias*, and should be pleaded in bar. If it may be the subject of a plea in bar, the Court will leave the party to plead it, and will not interfere by summary motion. There is no instance of the Court interfering in a matter of this nature, by granting such a rule as is sought for. The present motion is no doubt suggested by a mere obiter dictum of Mr. Justice *Bayley*, in the case of *Harley v. Greenwood* (a). That case decides that the fact that the plaintiff has proved the debt under a commission against the defendant, cannot be pleaded in bar to an action for the same debt. And Mr. Justice *Bayley* there says (b), that the bankrupt "may apply to the Chancellor to expunge the debt, or to the Court in which the action is brought, to stay the proceedings." And he refers to the case of *Watson v. Medex* (c), where he says the latter course was taken. In that case, however, the rule to stay proceedings was discharged, on the ground that the election was confined to the debt proved; and the report does not shew that any question was raised as to the power of the Court to interfere. Supposing this to be a case of the first impression, the Court will not interfere; for the 59th section, under which this rule is sought to be obtained, is directory only to the commissioners of bankruptcy, as to what conditions they are to demand before admitting proof of debt, and not addressed to Courts of common law. This may be seen by the different language used in the 126th section, when the Courts of common law are plainly intended to be included. The Courts of common law have always refused to interfere in matters of bankruptcy, leaving

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(a) 5 B. & A. 95.

(c) 1 B. & A. 121.

(b) *Id.* p. 102.

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parties to apply to the Bankruptcy Court, *M'Master v. Kell* (a), *Hill v. Reeves* (b), *Percy v. Powell* (c), *Oliver v. Ames* (d). There is also a case of *Ransford v. Barry* (e), which, if correctly reported, is directly in point against the present application. The case of *Atherstone v. Huddleston* (f) has no application on the present occasion; as there the proof of the debt, and the commencement of the action, were before the passing of the statute 49 Geo. 3, c. 121, in which a similar clause as to election was contained, and it was only necessary for the Court to decide in that case whether or not that statute was retrospective. There are several reasons why the Court of Bankruptcy is a more convenient tribunal. Here the proceedings only can be stayed, there the debt may be expunged. Great injustice might also arise, if Courts of common law were to exercise this power; for the commission might be fraudulently sued out, and after part of a debt proved, a supersedeas might issue. He cited also *Baker v. Ridgway* (g), *Ex parte Capot* (h).

Gray, in support of the rule. There has been no delay in making the present application. From the importance of the point involved, it could not properly have been made the subject of a motion at Chambers in the Vacation; and the present rule was moved for within the first four days of Term. It is said the defendant should have first appeared to the scire facias; but by so doing, the defendant might possibly have waived his present objection, and the instances are numerous, in which a defendant is heard without appearing. The defendant could not plead this in bar of the scire facias, as the case of *Harley v. Greenwood* (i) shews

(a) 1 B. & P. 302.

(b) *Id.* p. 424.

(c) 3 *Id.* p. 6.

(d) 8 T. R. 364.

(e) 7 Dowl. 807.

(f) 2 Taunt. 181.

(g) 2 Bing. 41; See S. C. 9 Moore, 114.

(h) 1 Atk. 219.

(i) 5 B. & A. 95.

such a plea would be demurrable. The cases of *M'Master v. Kell* (a), *Hill v. Reeves* (b), *Percy v. Powell* (c), and *Oliver v. Ames* (d), are no longer applicable. Those were cases before the passing of the 49 Geo. 3, c. 121; and at that time, the law undoubtedly was, that the proof of a debt by a creditor under a commission, was no election by the creditor to take the benefit of the commission, so as to relinquish his action. But by section 14 of that statute, it was enacted, "that it shall not be lawful for any creditor who has or shall have brought any action, or instituted any suit against any bankrupt in respect of any demand which arose prior to the bankruptcy of such bankrupt, or which might have been proved as a debt under the commission of bankrupt issued against such bankrupt, to prove a debt under such commission for any purpose whatever, or to have the claim of a debt entered upon the proceedings under such commission, without relinquishing such action or suit, and all benefit from the same; and that the proving or so claiming a debt under a commission of bankrupt by any creditor, shall be deemed an election by such creditor, to take the benefit of such commission with respect to the debt so proved or claimed by him." And that provision has been in terms re-enacted in the existing statute on the subject, 6 Geo. 4, c. 16, s. 59. That such was the former state of the law before these statutes were passed, is clear from the cases of *Ex parte Capot* (e), *Ex parte Lindsey* (f), and *Ex parte Dorvilliers* (g), and from the law as laid down in *Cooke's Bankrupt Law*, 6th ed. p. 130, which was published before the passing of these statutes; and the case there cited, of *Oliver v. Ames* (h) recognises this as the state of the law. So do the cases of *Ex parte Sharpe* (i) and *Ex parte Warwick* (k). The case of *Atherstone v. Huddle-*

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(a) 1 B. & P. 302.

(b) Id. 424.

(c) 3 Id. p. 6.

(d) 8 T. R. 364.

(e) 1 Atk. 219.

(f) Id. 220.

(g) Id. 221.

(h) 8 T. R. 364.

(i) 11 Ves. 203.

(k) 14 Ves. 138.

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ston (a), which has been cited, occurred very soon after the passing of the 49 Geo. 3, c. 121; and the only point there decided was, that that act had not a retrospective effect. But in the subsequent case of *Linging v. Comyn* (b), where the plaintiff after judgment obtained, proved his debt under the commission, and also proceeded against the bail, the Court discharged the bail upon motion. In the case of *Watson v. Medex* (c) no objection was taken to the jurisdiction of the Court. *Harley v. Greenwood* (d), came before the Court on demurrer, and the defence was there held not to be pleadable in bar, because it would then be concluded by the judgment. In *Adames v. Bridger* (e) the Court made a rule absolute for a stay of proceedings, in an action of debt, where it was sworn that the plaintiff had previously proved under the commission. In *M'Master v. Kell* (f), the commission sued out by the plaintiff was altogether void, the defendant being charged in execution at the time at the plaintiff's suit. *Cohen v. Cunningham* (g) shews that a commission is void under such circumstances; there being in point of fact no petitioning creditor's debt. As to the case of *Ransford v. Barry* (h), there is clearly some error in that report. The real circumstances of that case were, that the commission of bankruptcy was never acted on; and the Court held that as the plaintiff had not proved under the commission, he could not come within the terms of the act. It is said that in the present case, the scire facias is only for the costs, for which the commissioners refused to allow the plaintiff to prove under the commission; but it is apprehended, that that can make no difference in the decision to be come to by the Court.

(a) 2 Taunt. 181.

(b) Id. p. 246.

(c) 1 B. & A. 121.

(d) 5 Id. 95.

(e) 8 Bing. 314; See S. C. 1 M. & Sc. 438. There is a mistake in the report, in stating that the rule

was discharged; the context shews that it must have been made absolute.

(f) 1 B. & P. 302.

(g) 8 T. R. 123.

(h) 7 Dowl. 807.

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were discussed on this motion ; the first, whether the plaintiff having made proof of the debt, must be taken to have abandoned the action altogether, under the operation of the 6 Geo. 4, c. 16, s. 59 ; and secondly, whether if that were so, the defendant could apply for relief against the *scire facias* by motion, or must be compelled to plead to the writ.

First, the words of the section are clear, that under the circumstances of this case, the plaintiff could not prove the debt without relinquishing, not merely the debt, but the action or suit which he had brought or instituted for its recovery ; and in the absence of any authority, one could hardly doubt that the relinquishment of the action, would imply foregoing of any further proceeding in it for any purpose whatever. If indeed a plaintiff were at liberty to proceed by *scire facias*, or any writ of execution for the costs, where judgment had been signed before the proof made ; it is difficult to say why he might not proceed to replication or to trial, for the same purpose, where the proof had been made before judgment signed. I can find no authority which interferes with this the plain construction of the statute, nor was any such cited at the Bar.

But it was said, secondly, that the 59th section of the statute was adapted solely to the Court of Equity, and could not be acted on by a Court of law ; and this may be true in a certain sense. Indeed it is clear that the proving the debt could not be pleaded in bar of the action. This was established, upon the same provision in 49 Geo. 3, c. 121, by the judgments in the case of *Harley v. Greenwood* (a), and an additional reason is given by the provisions at the end of the section now in question, empowering the creditor to proceed in his action, in case the commission should be superseded, which of course he could not do if the action had been finally barred. But although in this sense the

(a) 5 B. & A. 95.

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notice and grounds of appeal had been duly served, and the principal ground of appeal was as follows:—

“That the said order of removal is bad and inoperative, because it was obtained and made, after a previous order of removal for the said Harriet Royle and her children from your said parish of Cwm, to our said parish of Llangerniew, dated on or about the 5th December, 1842, and under the hands and seals of H. L. T. and E. L., two of her Majesty’s justices, &c., had been obtained by and on behalf of your said parish of Cwm, and served upon the parish officers of our said parish of Llangerniew, and which said last-mentioned order was duly appealed against by our said parish of Llangerniew, and was, by an order of the Court of Quarter Sessions, holden in and for the county of Flint, on, &c., duly quashed upon the said appeal, and which said order of sessions was obtained on behalf of our said parish by virtue of a written consent and notice, dated, &c., under the hands of the then churchwardens and overseers of your said parish of Cwm. And neither in the written consent and notice, nor in the said order of sessions, in any manner is it specified or stated that the said last-mentioned order of removal was to be or was quashed for any defect of form; but the said Court of Quarter Sessions, by virtue of the said written consent and notice, ordered the same to be quashed generally; which said decision was and is conclusive between your said parish of Cwm and the said parish of Llangerniew, as to the settlement of the said Harriet Royle and her children, unless upon some new ground of settlement or removal arising since the said order of sessions was made.”

It appeared from the affidavits that on the appeal coming on to be heard at the sessions, the appellants relied on this ground of appeal. The sessions book being produced, it was found that the entry was in general terms: that the order be quashed. The respondents offered to shew by evidence, that it was quashed on a formal defect only; namely, on the ground that the examination of H. R. was

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case, and came to a decision. Here they refused to hear the evidence, and therefore cannot be said to have decided the point. It is clear, that they ought to have received this evidence; *Rex v. Wheelock* (a), *Rex v. Justices of Lancashire* (b), *Regina v. Perranzabuloe* (c). [Coleridge, J.—It will not, I apprehend, be contended on the other side, that the justices were right in refusing to hear this evidence.]

Hayes, contra. As the sessions have quashed the order generally, it will be taken that they heard the case and decided that the objection was not one merely of form. [Coleridge, J.—The justices cannot be taken to have heard you; for then they must also have heard the other side.] They were the sole judges of the point they have undertaken to decide, namely, whether the former order were conclusive or not; *Rex v. Church Knowle* (d). The evidence tendered would clearly have been insufficient: for it amounted to nothing more than a parol agreement between the attorneys on both sides. It could not, therefore, have carried the case further. At all events, the Court of Sessions have come to a decision on this point, however erroneous it may be: and this Court will not, when that is the case, interfere by mandamus, *Rex v. Justices of Carnarvon* (e), *Rex v. Frieston* (f). The decision in *Regina v. Kesteven* (g), proceeded on the ground of the defect in the examination being a defect on the merits. The present is even a stronger case; and that decision is, therefore, precisely in point.

COLERIDGE, J.—I wish very much that this case had not

(a) 5 B. & C. 511.

(b) 7 B. & C. 691.

(c) 3 Q. B. 400.

(d) 7 A. & E. 471; See S. C.
 2 N. & P. 359.

(e) 4 B. & A. 86.

(f) 5 B. & Ad. 597.

(g) 3 Q. B. 810; See S. C. 1

D. & M. 113.

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In the matter of the Arbitration between the Rev. A. S.
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A RULE nisi had been obtained in Michaelmas Term last, on behalf of a Mr. Farnel, to set aside an award, under the following circumstances:

A submission made between the executors of a deceased partner, and the surviving partner and others, recited a partnership as existing under an agreement from the 1st of January, 1837, and that it was alleged by N., the surviving partner, that a partnership had existed between him and the deceased, previous to the date mentioned, and that differences had arisen between

One Sarah Mason, a widow, had made a will; whereby she appointed the Rev. A. S. Warner and Mr. Farnel, her executors; and devised and bequeathed to them, her freehold, copyhold, and leasehold estates, and personal property; upon trust to sell and convert the same into money, and to pay her debts and certain legacies in the first instance, and to divide the residue into nine parts. She then bequeathed a ninth part to each of her children, Henry John, Robert, William, Mary Ann the wife of James Norris, Hannah, and Sarah, absolutely. She bequeathed another ninth for the use of the children of her son John Leeds Mason, to be paid, applied, and disposed of, as he or his representatives should think fit, for their maintenance

the parties touching the accuracy of certain statements of accounts delivered by N., showing the amount to which the deceased partner was entitled in respect of the said partnership, &c., and also touching several other matters and things touching the said account, and touching the administration of the estate of the deceased partner; and witnessed that the parties accordingly agreed to refer the same, and also all other matters and things in difference between the said parties. The arbitrator found that a partnership had existed between the said parties from the 18th day of December, 1835, up to the time of the death of the deceased partner, and that a certain sum was due as the balance upon the account: *Held*, sufficiently specific and certain, and that he was not bound to find separately how much was due under the partnership, under the agreement in 1837.

On motion by an executor and trustee under a will to set aside an award under a submission entered into by himself and other trustees and legatees for the purpose of ascertaining the assets and settling the accounts under the will: *Held*, that it was no objection that certain married women who took interests under the will, which were affected by the award, were parties to the submission: Nor that there were certain infant legatees who were not bound thereby, who were also interested: Nor that the matters submitted affected the trust estate of married women and infants.

By the deed of submission, it was covenanted that the parties thereto should execute all such deeds, &c., as might be requisite for putting an end to the differences, and administering the estate and effects, &c., and carrying into execution, the trusts, &c., as the arbitrator should direct; even if such deed were to be between them and a stranger to the submission: *Held*, no excess of authority that the arbitrator had directed that in consideration of certain sums paid and to be paid, conveyances should be executed of certain freehold and leasehold property of the deceased; although one of the conveyances was to be to a stranger to the submission; the affidavits shewing that the question of these conveyances had been discussed before the arbitrator, with the assent of all parties, and that it was one of the matters in dispute between the parties, and intended to be referred by the deed of submission.

Nor was it held any objection, that the award directed one of the parties thereto to pay the amount of the legacy duty on certain shares of the assets, of which he had become the owner.

and education until the youngest attained twenty-one years of age; and upon his death, or upon the youngest child attaining the age of twenty-one, whichever should last happen, then to be divided equally amongst the children. She directed, that in case John Leeds Mason should be willing to take the bequest on these trusts, it should be paid to him, and his receipt be a sufficient discharge to her executors. Another ninth share, was to be laid out in government or real securities, with power to vary the securities, and the interest thereof to be paid to her daughter Elizabeth, the wife of J. Thurston, to her separate use, without power of anticipation, and after her death, to be divided equally among her children. The remaining ninth share was afterwards by a codicil directed to be divided into eight parts, of which one was to be added to each of the foregoing shares. There were the usual trustee clauses in the will. On the 12th of December, 1836, she entered into an agreement of partnership with her son-in-law James Norris, for a period of ten years, from the 1st of January, 1837; with a proviso, that he should be at liberty in the event of her death, to purchase her moiety of the partnership effects at a valuation, and to continue in possession of the premises in which the business was carried on, and which belonged to her, for the remainder of the term. By a codicil to her will, she directed that he should have the right of pre-emption with respect to these premises for a sum fixed. In November, 1840, she died. Up to the time of her death, Norris remained on the premises, carrying on the business of the partnership; and after that event, he elected to buy her share, and to purchase the premises at the price named. The money, however, was never paid. The executors afterwards entered into an agreement, with the sanction of several of the children, for the sale of a part of the testatrix's leasehold estate to H. J. Mason, for 160*l*.

The executors being unable to get what they considered a satisfactory account of the partnership effects from Norris, agreed to refer the matter to arbitration. Accordingly a

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deed was executed between the Rev. A. S. Warner and J. Farnell, as executors and trustees, of the first part, and R. Thurston and Elizabeth his wife, of the second part, and J. Norris and Ann his wife, of the third part. It recited that it was alleged by J. Norris, that previously to 1837 there were certain partnership dealings between the said Sarah Mason and J. Norris; and recited the agreement of partnership of the 12th December, 1836, and that the partnership had subsisted from the 1st January, 1837, to the day of her death. It also recited her will, and that Henry John Mason, William Mason, Robert Mason, Hannah Mason, and Sarah Mason, the wife of H. King, had sold their shares; and that the said John Leeds Mason had sold his share or interest of his children under the will, to the said James Norris and wife; and that therefore R. Thurston and wife, and James Norris and wife were the only persons beneficially interested in the proper distribution of the said trust funds and property: and that "differences had arisen between the parties thereto, touching the accuracy of certain statements of account which had been delivered by the said James Norris purporting to shew the amount to which the said testatrix was entitled in respect of the said partnership at the time of her decease, and the value of her share in the stock and capital thereof; and also touching several other matters and things in regard to the said account, and touching the said account, and touching the administration and carrying into due execution the trusts of the will of the said Sarah Mason; and that in order to put an end to the said differences, all the said parties had agreed to refer the same, and also all other matters and things whatsoever in difference between the parties." It therefore witnessed that A. S. Warner and J. Farnell as executors and trustees, and R. Thurston and wife, and J. Norris and wife, did covenant and agree to abide by, observe, and perform, the award of J. N. "of and concerning the premises so as aforesaid referred, or any thing in anywise relating thereto,

and also of and concerning all actions, causes of action, suits, bills, bonds, contracts, accounts, reckonings, sums of money, controversies, and demands whatsoever, both at law and in equity—commenced or depending between the said parties.”

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It was also covenanted that each of the said parties should make out, prepare, sign, and execute “all such accounts, statements, deeds, instruments, and writings, and fulfil and perform all such contracts, as may be requisite for putting an end to the said differences, and for duly administering the estates and effects late of the said Sarah Mason, and carrying into execution the trusts of her said will and codicil, as the said arbitrator shall direct; and that, whether any of such deeds or instruments be between the parties to these presents, or between them or any of them and any other person or persons not a party or parties hereto.” A power was also given to the arbitrator to award concerning costs. The deed was duly executed by the respective parties thereto.

On the 1st of June, 1843, the arbitrator made his award, finding that “a partnership subsisted between the said Sarah Mason and J. Norris, as, &c., from the 18th of December, 1835, up to the time of the decease of the said Sarah Mason;” and that “in taking the account between the said executors and the said J. Norris as to the testatrix’s share of the partnership assets, the sum of 994*l.* 13*s.* 9*d.* was the balance upon the said account, and is now in the hands of the said J. Norris to be accounted for by him,” &c. The award then stated that the executors had contracted to sell to Henry John Mason, certain leasehold premises, part of the estate of the said Sarah Mason, at the price of 160*l.*; and that James Norris had agreed to purchase the freehold premises on which the business was carried on, with respect to which by the will of the testatrix he was to have the right of pre-emption, for the stipulated sum of 1400*l.*; and that he had also purchased the share of H. J. Mason to the residuc of the testatrix’s estate

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for 250*l.*, 90*l.* of which he had paid to H. J. Mason, and for the remainder was to account to the estate, as the purchase money of the leasehold premises, which H. J. Mason had agreed to purchase of the executors. It also stated that the executors were only entitled to the equity of redemption in the freehold premises subject to a mortgage of 1000*l.*; and therefore awarded that J. Norris should be accountable to the estate for 400*l.* only, in addition to the 160*l.* The arbitrator then found that the estate consisted of certain property which he specified. He awarded certain costs to be paid out of the estate; and directed that the said A. S. Warner and J. Farnell, as such executors and trustees as aforesaid, should before, &c. duly execute to H. J. Mason the assignment of the leasehold premises, &c., and to J. Norris the conveyance of the equity of redemption of the freehold premises, &c. That J. Norris was to pay out of the money in his hands for which he was accountable, 39*l.* 16*s.* 10*d.*, to A. S. Warner for his costs, and that J. Farnell might retain a similar sum, but was to pay three-fourths of the costs of the arbitration. He also awarded that J. Norris should pay to the executors one-eighth part of the balance of the assets remaining in his hands; which eighth part, after paying thereout the legacy duty, and the expenses of the legacy discharge, was to be invested by the said executors "pursuant to the direction of the aforesaid will and codicil for the share of the wife and children of the said Richard Thurston, in manner following," &c. He then directed it to be invested, and limited the trust with regard to it, in exact conformity with the terms of the will. And he further ordered that James Norris should pay the legacy duty on the seven shares of residue, to the receipt of which he was entitled as above recited.

The affidavits also stated that Farnell had objected when he found the arbitrator was entering into the question of the general distribution of the estate, and had thereupon

revoked the power of the arbitrator. As the deed, however, contained the usual clause for making it a rule of Court, this was inoperative. The children of John Leeds Mason were minors, as were also those of Thurston.

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The award was now sought to be set aside on the following grounds :

First, That the award was not made in pursuance of the submission, the terms of which specify a partnership therein mentioned, with reference to a certain settlement of accounts therein, and all matters in difference ; whereas the award bore reference to “ a certain partnership from December, 1835, to the death of Sarah Mason, and takes an account of such partnership.”

Secondly, That the award was not final, inasmuch as the children of one John Leeds Mason who were minors, the wives of Norris and Thurston, and the children of Thurston also minors, and all interested parties, were not bound by its terms.

Thirdly, That the award as to the purchase of Henry John Mason, and the conveyance awarded, and payment of 160*l.* was beyond the submission, and is not final.

Fourthly, That the award was beyond the submission, and uncertain, and not final in awarding James Norris to pay or account for 400*l.* in payment of the estate, and leaving the mortgage, 1000*l.* unpaid.

Fifthly, That the arbitrator had no power to make an award with reference to the estate of Sarah Mason.

Sixthly, That the award was bad, and beyond the submission, and not final, and was uncertain in awarding that James Norris should pay the legacy duty.

The affidavits in answer, shewed that there had existed a partnership between Norris and Sarah Mason, ever since December, 1835, and that the accounts of that partnership were one of the matters in difference, and that it was much discussed on both sides before the arbitrator. They also shewed that the mode of disposing of and conveying the

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freehold property purchased by Norris, and the leasehold purchased by H. J. Mason, and the payment of the purchase money, were likewise discussed, and that Norris had agreed, on purchasing the different shares, to pay the legacy duty, which was also a matter discussed before the arbitrator; and that Mrs. Mason had only the equity of redemption in the freehold premises in which the business was carried on, and which had been purchased by Norris, and that she had never made herself personally liable for the mortgage thereon.

Cowling and *Palmer* shewed cause (a). As to the first objection, the deed of submission recites, that it was alleged by Norris, that certain partnership dealings had taken place between him and Mrs. Mason prior to 1837; and that differences had arisen touching the accuracy of certain accounts, purporting to shew the amount of her share in respect of the said partnership; and that the parties had agreed to refer the same and all other matters in difference: and the parties then covenant to observe and perform the award of and concerning the premises so as aforesaid referred, &c. There is, therefore, no excess of authority here; the subject is *primâ facie* included in the terms of the submission, and the opposite side should have shewn by affidavit, which they have not done, that it was not intended to be included. The second objection seems to be, that the executors could not refer disputes between themselves as executors and others; because they were trustees for married women as well as for infants. Even were this a good objection to the award, it is not one on which this Court would grant the present motion, but leave the parties to make it in case the award should be attempted to be enforced, *Wrightson v. Bywater and Others.*(b) With respect to married women, it is by no means clear

(a) In Easter Term.

(b) 3 M. & W. 199; See S. C. 6 Dowl. 359

that they could not give a consent to a reference. The case of *Bendix v. Wakeman* (a) shews that even the deed of a married woman is not absolutely void, where it regards her separate estate. As to the objection that the children of J. L. Mason, and of Thurston, who are minors, cannot be bound by the award, the case of *Jones v. Powell* (b) shews that that is no objection, when made as in the present instance by a party, who was aware of the fact at the time of entering into the deed of reference. The same doctrine is held in *Wrightson v. Bywater and Others* (c). Besides here, there is nothing ordered to be done by the award with respect to the children. As respects the third objection, the arbitrator had power to award with regard to matters and things "touching the administration and carrying into due execution the trusts of the will" of Mrs. Mason, and he accordingly has ordered the trustees to fulfil the contract which they had entered into. Besides, there is no affidavit on the other side, that this was not a matter in dispute; whilst on our side, it is sworn, that it was. The fourth objection is met by our affidavits, which shew that Mrs. Mason had nothing whatever to do with the mortgage of 1000*l.*, having purchased only the equity of redemption, and never having made herself personally liable for the mortgage. The fifth objection is already answered by what has been said with respect to the second. The sixth objection is met by our affidavits, which distinctly shew that it was a matter in dispute, and discussed before the arbitrator.

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Watson, in support of the rule. As respects the first objection, there should have been an award of how much was due in respect of the alleged partnership up to 1837, and how much since. The award should have been specific

(a) *Ante*, vol. 1, p. 450; See
S. C. 12 M. & W. 97.

(c) 3 M. & W. 199; See S. C.
6 Dowl. 359.

(b) 6 Dowl. 483.

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on these points, *Randall v. Randall* (a), 1 *Roll. Abr.* 256, tit. "*Arbitration*," and *Pope v. Brett* (b), and not being so, is bad altogether. Indeed, it is not clear that the arbitrator has awarded at all in respect of the partnership mentioned in the agreement; and, therefore, the award is defective, *In the matter of Rider and Fisher* (c). The second objection is an important one, namely, the want of mutuality between the parties. It is said, that a party aware of the objection at the time of signing the deed of reference, cannot avail himself of it. But to hold this doctrine is to overrule the case of *Biddell v. Dowse* (d). There matters in a suit in Chancery, being ordered by the Vice Chancellor, with the consent of the attorneys of the parties in the suit, to be referred to A. B.; it was held, upon error, that no sufficient authority to refer on behalf of the infant plaintiffs was shewn, the attorneys in the suit having no such authority; and that, therefore, the submission was not mutual, and, consequently, the award was bad. In that case, the party must have been aware of the objection, when he entered into the reference. ' So also in *Thorp v. Cole* (e), the party must have been aware, at the time of the submission, of the want of power on the part of the parish officers referring; but that circumstance was not held to bar him from afterwards raising the objection. The children of Thurston were interested in the assets, for they were to have the eighth part thereof; and in the award, the arbitrator directs certain payments out of the assets; so that their interests were clearly involved in the award. If the children were to bring a bill in equity, it would be no defence that an award had been made. There is, therefore, no mutuality in this award, and if that objection is ever to prevail in a

(a) 7 East, 81; See S. C. 3 5 Scott, 86.
 Smith, 90.

(b) 2 Saund. 292; See S. C. 2 9 D. & R. 404.

Keble, 736.

(c) 2 C., M. & R. 367; See
 S. C. 4 Dowl. 457.

(d) 3 Bing. N. C. 874; See S. C.

motion of this nature, it ought on the present occasion. The third objection is, that the award has reference to Henry John Mason, who is no party to the submission. It directs the executors to convey the estate to him, and he sells to Norris, who is to be accountable to the estate for the purchase money. The case of *Fisher v. Pimbley* (a) shews that the award is bad on this ground. Besides, an executor may bind himself, but not the estate, by the reference. Yet here, the award, if allowed to stand, would affect the estate, for it directs conveyances to be made. It, therefore, amounts to a devastavit, *Com. Dig.*, tit. "*Administration*," (I. i.). The fourth objection is, that the award leaves the executors liable in equity to pay off the mortgage. The sixth objection is, that the award is not final, for Norris is ordered to pay the legacy duty, and it is not clear that he could do so; for before it is payable, the amount of the estate must be ascertained.

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Cur. adv. vult.

COLERIDGE, J. now delivered judgment.—This was a rule to set aside an award on several grounds. It appears that one Sarah Mason, a widow with many children, had carried on business in Norwich; and for some years previously, and up to the time of her death, in partnership with James Norris, who had married one of her daughters. She died in November, 1840, leaving a will, by which she in effect devised her property in equal ninth shares amongst her children, and the issue of those who had died before her. These shares, by purchase, had all come either to James Norris and his wife, or Richard Thurston and his wife, another daughter. Disputes had arisen between them respectively and the executors, and these had led to the submission and arbitration, of which the award in question was the result. The submission and award are long and

(a) 11 East, 188.

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complicated, and many affidavits were filed ; but when the facts are understood, the case seems free from difficulty.

The first objection is, that the award is not in pursuance of the submission, in this, "that the latter relates to a partnership therein mentioned, with reference to a certain settlement of accounts therein, and all matters in difference ; whereas the award refers to a certain partnership from December, 1835, to the death of Sarah Mason, and takes an account of such partnership." I collect, however, on reference to the submission, that although there was certainly an agreement for a partnership commencing in December, 1836, yet James Norris had contended, that partnership dealings had taken place between the deceased and himself at some certain period not precisely fixed ; that the accuracy of his account generally was disputed, and that for want of more satisfactory accounts, it was alleged that the affairs of the executorship could not be properly wound up. I find, also, that not only the partnership from the admitted date, and the accounts relating thereto, and the differences respecting the same ; but also all other matters and things in difference between the parties, were referred in the largest terms. It seems to me, therefore, no excess of jurisdiction in the arbitrator, to inquire into the date of the commencement of any partnership, and if he found one to have existed previously to the agreement of 1836, he might very probably also find that the accounts were so blended with those of the partnership after the agreement, as to make it impossible to award on the latter separately. With a view to the real object of the arbitration, namely, the determining the share of the testatrix, and how her account alternately stood with her partner, for the purpose of distribution under the will, it would have been manifestly useless so to do. This ground of objection, therefore, fails on the facts.

Secondly, it is objected that it is not final, because the children of one John Leeds Mason, who are minors, the

wives respectively of Norris and Thurston, and the children of 'Thurston, also minors, who are interested parties, are not bound thereby. With regard to the children of John Leeds Mason, they were to take a share under the will, which was left during their minority in the management of their father, and it appears that before the submission, their father had sold that share to Norris; whether such sale was authorized by the will or not, is immaterial for the present question; they were in no way made parties to the reference, nor are their rights affected by the award; the arbitrator could not inquire into the legality of any conveyance or purchase by which Norris had become the owner de facto of one or more shares; he could only deal with the parties before him, according to the shares and interests, which they admitted each other to have, as the basis of distribution. The same answer does not apply to the wives of Norris and Thurston, and the children of the latter; Norris and Thurston as to certain parts of the property, being interested under the will, only in respect of their respective wives and children. But as to the wives, they are made parties to the reference; of this all the other parties are cognisant, and I am opinion, that I ought not to yield to the objection of their coverture, now put forward by one of the executors, and set aside the award on this ground at his prayer. He never should have consented to refer the matter in dispute and allowed them to become parties, if he intended to make this objection. An award is only to be set aside for some miscarriage of the arbitrator; but he has been guilty of none in dealing between the parties referring and on the matters referred. As to Thurston's children, I cannot see that the award in any way affects them—the executors had clearly a right to ascertain the assets in any way they chose—at least they have elected to do so under this arbitration, and one of them cannot now disannul that election—and when the sum to be divided is thus found, the award only directs as to the Thurston's share, that it is

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to be invested, and limits the trust with regard to it in exact conformity with the will. This may have been wholly unnecessary; but it cannot prejudice the rest of the award.

The third and fourth objections relate to parts of the testatrix's estate other than the partnership, a leasehold property and a freehold estate; and it is objected, that there is excess in the award in dealing with these at all; and also that the manner of dealing with them is bad for uncertainty and want of finality. But the parties to the reference were the executors and the principal legatees, and the submission recites that there had been disputes touching the administration and carrying into due execution the trusts of the will—and these were referred. It appears accordingly by the affidavits, that these two questions were gone into before the arbitrator in the presence of the executors as well as the other parties, and they taking part in the inquiry: they seem, therefore, to have put their own interpretation on the language of the submission. I cannot think it an unreasonable one—at all events the interference of the arbitrator cannot be objected to as beyond his power. Neither am I able to see that there is any thing uncertain, or otherwise than final in his mode of disposing of the questions.

The fifth objection, that the arbitrator had no power to make an award with reference to the estate of Sarah Mason is founded on the same matter as the two last preceding; and has already been answered.

The sixth and only other objection which was insisted on was, that the arbitrator had awarded that James Norris should pay the legacy duty on seven shares, of which he had become the legal or beneficial owner. It is evident that this arose out of a question as to the party on whom, inter se, this burthen should fall, and he, on whom it is placed, does not complain. The executor who does, cannot be prejudiced; he need not and ought not to pay the share without first retaining the duty—and the award as to this

will either entitle the party paying to be repaid by Norris, or it is merely surplusage. I am of opinion, upon the whole, that the rule upon all points should be discharged with costs.

Rule discharged, with costs.

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IN this case, judgment having been signed against the casual ejector, and possession delivered to the lessor of the plaintiff, the defendant had moved the Court to set aside the judgment, and to be let in to defend the action, as landlord of the premises sought to be recovered, on the ground that the tenants in possession had neglected to give him notice of the action; and the following order had accordingly been made by the Court: "that judgment and execution in this action be set aside; and that J. Shail be admitted to defend this action as landlord, on payment of costs to be taxed by one of the Masters; and that possession be restored in case the said J. Shail succeeds in his defence, or the lessor of the plaintiff does not proceed to trial at the next assizes for the county of Berks." This order was served upon the lessor of the plaintiff and also on the tenants in possession, on the 8th of March, in the present year. At the Spring Assizes, the cause was called on for trial; but no one appearing on behalf of the lessor of the plaintiff, he was accordingly nonsuited. A demand of delivery up of possession of the premises had been made, both upon the lessor of the plaintiff, and the respective tenants, who had refused to comply with it.

In Easter Term, a rule calling on the lessor of the plaintiff to shew cause why a writ of restitution should not issue, having been obtained;

After judgment in ejectment, and possession delivered, the landlord of premises had been let in to defend the action, on the ground that he had received no notice of the proceedings; and the judgment signed against the casual ejector had been set aside on payment of costs, the lessor of the plaintiff undertaking to try at the next Assizes; and in case of his failure to do so, possession to be restored to the landlord. He failed, however to do so, and judgment of nonsuit was entered up against him. The Court afterwards granted a writ of restitution at the suit of the landlord.

Symons now shewed cause, upon an affidavit, stating that

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the default on the part of the lessor of the plaintiff in not proceeding to trial had arisen from the wilful misstatement of his then attorney. It is submitted, however, that a writ of restitution is not the proper remedy, and that the Court has no power to issue it under the present circumstances. A writ of restitution lies only where there is error in the judgment, or after some decision clearly establishing the title of the party by whom restitution is sought (*a*). Here the judgment has been regularly obtained, and has not been reversed as erroneous; nor has there been any decision on the merits. The defendant does not allege in his affidavit that he has any title to the property; while the lessor of the plaintiff, on the other hand, distinctly alleges his title. The defendant's only proper remedy is to obtain an order for the lessor of the plaintiff to restore possession, *Doe dem. Stevens v. Lord* (*b*); and if that order be disobeyed, the Court will then grant an attachment against him, *Anon* (*c*). The only authorities in favour of this motion are *Goodright dem. Russell v. Norright* (*d*), and *Doe dem. Pitcher v. Roe* (*e*). In the former case, which is very briefly reported, the writ issued because the lessor of the plaintiff had absconded, and the defendant would consequently have been without remedy. In *Doe dem. Pitcher v. Roe*, the lessor of the plaintiff had been forcibly turned out of possession after being put in by the sheriff. The Court will not disturb a possession regularly obtained, until there has been a trial of the merits, *Doe ex. dem. Ingram v. Roe* (*f*). This is in fact the point upon which the right to this writ has uniformly turned; it is not intended to shut out the merits, and never issues where title is still in question. *Coleridge, J.* expressly ruled this in his judgment in *Doe dem. Stevens v. Lord*, where in reference to *Goodright dem. Russell v. Norright*, and that class of cases, he said, "This is very

(*a*) 2 Lill. Pr. Reg. 472, 4.

(*b*) 2 N. & P. 605; See S. C. 7
 A. & E. 610; 6 Dowl. 256.

(*c*) 2 Salk. 588.

(*d*) Barnes' Notes, 178.

(*e*) 9 Dowl. 971.

(*f*) 11 Price, 507.

different from the cases cited, where there was no title whatever to the possession." Justice in this case will be more fully obtained by postponing the decision on this rule, until the plaintiff has had the opportunity of trying the cause, and establishing his title, at the next assizes.

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Selfe, in support of the rule. The power of the Court to award a writ of restitution is not restricted to cases where the judgment is reversed on error. No attempt was made in the case of *Doe dem. Williams v. Williams* (a) to thus confine it; and there a similar objection, if tenable, would have been successful. In *Doe dem. Stevens v. Lord* (b), though the objection was made, no notice was taken of it by the Court in their judgment. The sole reason why in that case, a writ of restitution did not issue, was because there the judgment in ejectment had not been set aside. Here it has been set aside, not because erroneously made, but because irregularly obtained. There can be no difficulty in the form of the writ of restitution. The writ will recite, that it has appeared to the Court, that the judgment has been irregularly obtained; *Tidd's Prac. Forms*, 655, tit. "*Execution*;" and such is the fact in the present case. It is true, that an attachment might, perhaps, be obtained against the party; but that is the proceeding of the Court to vindicate its dignity; and the defendant is not the less entitled to his remedy for the breach of the condition into which the lessor of the plaintiff entered, and under which he was allowed to retain possession of the premises until the next assizes. (He was then stopped.)

COLERIDGE, J.—I think this rule must be made absolute. I must take it that in the present case, the prior judgment had been irregularly obtained. The effect of the former rule is decisive on that point; and I think that when that rule

(a) 2 A. & E. 381; See S. C. 4 N. & M. 259.

(b) 2 N. & P. 605; See S. C. 7 A. & E. 610; 6 Dowl. 256.

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was made, it was competent to the Court to have awarded restitution of the premises to the defendant. Such must be considered to be the effect of the authorities on this subject. They did not, however, do so, but made a conditional rule, with which the lessor of the plaintiff has not complied; and application is now made under stronger circumstances for the Court to award that remedy, which they could have done before. The lessor of the plaintiff ought not to be allowed, under colour of the process of the Court, to reap the benefit of a judgment which has since been set aside. The rule will, therefore, be absolute.

Rule absolute. (a)

(a) The rule was drawn up in the following form: "It is ordered, &c., that a writ of restitution issue in this cause without costs."

In the case of *Rex et Regina v. Leaver*, (2 Salk. 587,) which was not brought under the notice of the Court upon the present occasion, *Holt*, C. J., puts this point: "A recoverer in ejectment is disseised; or makes a feoffment, afterwards the judgment is reversed: Will a writ of restitution lie? and he answers it in the negative; "because the disseisor or feoffee are strangers to the record;" and *Pemberton*, J., agreed. In *Doe dem. Williams v. Williams*, (2 A. & E. 381.) it was argued that the writ of restitution would be inconsistent; inasmuch as the writ recites, that John Doe has irregularly recovered his term in the premises from Richard Roe, and obtained a writ of possession, and then directs the sheriff to cause restitution to be made "to William

Williams, or his assigns, at whose instance the judgment aforesaid hath been set aside by us, he the said W. W. being landlord and owner, and in possession of the tenements aforesaid." The same inconsistency, it seems, would occur in the writ granted in the principal case; the judgment irregularly obtained, being by default against Richard Roe, and the writ of restitution being awarded in favour of a party whose name in no way appears upon the record; except at a stage subsequent to that at which it is decided his right to the writ first accrued. Almost the only precedent of a writ of restitution after a judgment in ejectment to be found in the books, is contained in Lilly's Entries, p. 635, and there the erroneous judgment was not, as in the present instance, against the casual ejector; but against the same party, at whose suit the writ of restitution was awarded.

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FERGUSON v. ROBERT CLAYWORTH and SARAH his Wife.

(In the full Court.)

THIS was a rule to discharge the above-named defendant, Sarah Clayworth, out of custody, on the ground that she was a married woman. The above action had been brought against husband and wife for slander uttered by the wife. At the trial, a verdict had been found for the plaintiff, damages, 40s. A ca. sa. was thereupon issued against both the defendants, to levy the amount of damages and costs, and the wife alone taken in execution under it. The present rule was then obtained on an affidavit by the wife, stating that she was living apart from her husband, and that she was "not possessed of, or in any way entitled, either in possession, remainder, or reversion, to any property, estate, goods, chattels, or effects whatsoever, the necessary wearing apparel of the deponent only excepted; and that she had no means or expectation whatsoever of being able to satisfy the damages and costs in the action, or any part thereof; and that she depended wholly for her support on her son." There was an affidavit also by her son to the same effect, and that he had wholly supported her for several years past, during which time she had been separated from her husband. In the affidavit filed in opposition, it was stated that a deed had been executed by the son, in which he covenanted, in consideration of the father giving up the business, which he then carried on, to him, that he would provide for his mother out of the proceeds. The supposed clause to this effect was set out in the affidavit in the following terms:—"And the said R. C. the younger, covenants with the said R. C. the elder, to maintain and keep his said mother for and during the term of her natural life; provided she shall think fit to reside with him and assist in the business: and also to maintain and

On an application to discharge a defendant out of custody, on the ground that she is a married woman, the Court will require the strictest negative proof from her, that she has no separate property; where it appears from the affidavits on the other side, that there are reasons for doubting such to be the fact.

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keep his brothers and sisters, until they attain the age of twenty-one years," &c. The affidavit then went on to allege, that at the time of the grievances, and at the time of the execution, she was residing with her son, and assisting him in his said business, &c. It also appeared by the affidavit, that there were reasons for believing, that the wife was entitled to some property unknown to her son, as well as some money in a savings bank.

Platt, with whom was *Warren*, shewed cause. By the plaintiff's affidavits, it appears that the wife assists in carrying on the business with the son, under the terms of a deed, and that there is reason for supposing that the wife has separate property. She may be entitled to property under a trust. She should shew, beyond a doubt, her inability to pay the amount of this execution. The Court has a discretionary power in the matter, where it appears, as in the present case, that there is no collusion between the plaintiff and the husband, to keep the wife in prison, *Chalk v. Deacon* (a), 1 *Tidd's Prac.* 196, 9th ed.; and they will not exercise it where there is a doubt as to her inability to pay, and where, as in the present case, it appears that she is the sole cause of the action being brought.

Watson, with whom was *Edwin James*, in support of the rule. The defendant has sworn that she has no property whatever. This case is similar to *Hoad v. Matthews* (b); there the wife swore that she had no property in her own right separate and apart from her husband; and it was alleged that she was entitled to certain property under a will, and that she should have shewn that she was not entitled to it: but Mr. Justice *Patteson* there said, that although it would have been more satisfactory if she had

(a) 6 Moore, 128.

(b) 2 Dowl. 149.

produced the will, the burden of shewing that the property was for her separate use, was thrown on the other side.

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LORD DENMAN.—The Court has a discretion in this matter, according to the case of *Chalk v. Deacon* (a), and that being so, it seems to me, that the present case is not one which calls for its interference. It appears that the defendant assists in carrying on a business with her son ; and that fact, I think, throws the burden of proving that she has no property, upon her. It is true, that she swears generally that she is not entitled to any property ; but she does not say, as she might have done, that no one else holds any property in trust for her.

PATTESON, J.—It appears to me, that the affidavits do not satisfactorily shew, that she is not entitled to the benefit of any property held in trust for her. In this case, the parties who swear have the deed in their possession. I am not prepared to say that the onus of proof should not be more upon the married woman, than I am reported to have said in *Hoad v. Matthews* (a) ; but at any rate in the present case, the facts which have been sworn to, change the onus of proof and throw it on the defendant, and so the present case is distinguishable from the one referred to.

WILLIAMS, J. and COLERIDGE, J. concurred.

Rule discharged, without costs.

(a) 2 Dowl. 149.



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REGINA v. The Inhabitants of BLOXHAM (a).

(In the full Court.)

On motion to quash a writ of certiorari, quia improv. &c., it appeared, that the jurat of the affidavit, on which it was granted, and which was sworn before a commissioner, omitted the words "before me." The affidavit referred to a notice annexed, at the foot of which was written "this is the notice, referred to in the affidavit sworn before me, this 13th day of February, 1844, William Munton, &c.;" Held, that the above was a fatal defect, and that it could not be cured by reference to the annexed document, or waived by the lapse of several months between the time of the writ of certiorari being granted, and the present application.

PIGOTT had obtained a rule (b) to shew cause why a writ of certiorari, which had brought up a special case from the Oxfordshire Quarter Sessions, and which was in the Crown paper for argument, should not be quashed, quia, improv. &c. The affidavit upon which it was granted, which was required by the act 13 Geo. 2, c. 18, s. 5, was defective in the jurat. The jurat was "sworn at Banbury, this 18th day of February, A. D. 1844." Signed, "William Munton, a commissioner of the Court of Queen's Bench." The affidavit referred to the notice annexed, and at the foot of the notice so annexed, was written, "This is the notice, referred to in the affidavit sworn before me, this 18th day of February, 1844, William Munton, &c." The jurat did not shew before whom the affidavit was sworn; the words "before me" being omitted; and it could not, it was submitted, be made good by reference to the annexed notice.

The rule came on in the full Court, together with the case in the Crown paper.

Keating and *Pashley* shewed cause. This objection is too late. The defect is a mere irregularity, and the objection should have been taken before. The certiorari has been returned for some months. Besides which, the defect is cured by the annexed notice. *Reg. v. Silkstone* (c) is in point; there the words were "before me," instead of "before us;" two justices being required to be present; and the Court held it sufficient, presuming omnia ritè esse acta; and they will do so, it is hoped, in the present instance.

(a) This case was decided in Michaelmas Term.

(c) 2 Q. B. 520; See S. C. 2 G. & D. 396.

(b) In the Bail Court.

In *Rex v. Emden* (a), it was held, that the jurat is no part of the affidavit, and if the place where sworn be wrong, it may be contradicted on the trial of an indictment for perjury. They were then stopped.

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Pigott. The objection is, that the affidavit appears to have been taken coram non judice. No perjury could be assigned upon it. In *Bac. Abr.* tit. "*Affidavit*," it is said, "An affidavit is an oath in writing signed by the party deposing, sworn before, and attested by him, who has authority to administer the same." The commissioners derive their jurisdiction from the 29 Car. 2, c. 5, s. 2, which authorizes them to receive such affidavit as any person or persons shall be willing or desirous to make before them. It is consistent with this jurat, that the affidavit was sworn before some person who had no power to administer an oath, *Howard v. Brown* (b), *Pardoe v. Terrett* (c). *Rex v. Emden* is not in point. In *Rex v. West Riding of Yorkshire* (d), Lord Ellenborough expressly held a jurat defective, which had been sworn before a commissioner, but in which the place where sworn did not appear. The Court then said, "To dispense with these forms is only to get into uncertainty and mischief, and by a strain of jurisdiction to help parties through that which they ought to look to themselves." Then the notice cannot cure the defect. If the Court will once call in aid some other document, they must go into any number that happen to be referred to by the affidavit. The notice is a distinct paper, and not part of, or incorporated in the affidavit; besides it may not have been annexed till some hours after the commissioner had signed the affidavit, and then he is immediately functus officio. *Reg. v. Shipton-on-Stour* (e), is similar to the present case. The Court have

(a) 9 East, 437.

6 Scott, N. R. 273; 5 M. & G. 291.

(b) 4 Bing. 393; See S. C. 1

(d) 3 M. & S. 493.

M. & P. 22.

(e) Car. Ham. & Allen's New

(c) 2 Dowl. 903, N. S.; See S. C.

Sess. Ca. p. 230.

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always held parties strictly to the form of the jurat, and the words here omitted are the most important part of it; *Molling v. Poland* (a), *Osborn v. Tatum* (b), *Wood v. Stephens* (c), *Lilly's Abr. tit. "Affidavit."*

Pashley was heard in reply.

LORD DENMAN, C. J.—I was at first disposed to view this as a technical objection, but it appears to be one of some importance. The jurat of an affidavit should adhere to forms. I find no form which omits the words that are here wanting. I agree with Lord Ellenborough in the case of *Rex v. West Riding of Yorkshire* (d), that to depart from these forms will only lead us into uncertainty and difficulty. If anything were wanting to confirm that opinion, the cases which have been referred to in the argument, and which shew the numerous questions that have already arisen in practice, are amply sufficient for the purpose. This is not an irregularity that could be waived, nor can we import the contents of a notice into an affidavit without obliging ourselves to go in future, into any number of documents, that happen to be annexed, or referred to, in it.

WILLIAMS, J.—I also am of opinion that the jurat to this affidavit is defective. It is quite consistent with every thing that is stated in it, that no oath may have been administered by the commissioner who has signed it; whereas he ought to attest that the oath was sworn before him.

COLERIDGE, J.—I quite agree in the view taken by the Lord Chief Justice, and, indeed, my first impression was, that the objection was a valid one. The jurat may be perfectly true, and yet the affidavit may not have been made before a person of competent authority. This, then, is a defect that cannot be waived; it is more than a mere irreg-

(a) 3 M. & S. 157.

(b) 1 B. & P. 271.

(c) 3 Moore, 236.

(d) 3 M. & S. 493.

gularity, and goes to the very foundation of the affidavit, for in effect it ceases to be an affidavit at all. I am quite clear that we cannot look into some other document for the purpose of making good a jurat which is in itself defective, merely because that document happens to be annexed to, or referred to in, the affidavit. If we were ever to go that length, no line could be drawn; and there is no knowing, hereafter, into how many documents we might not be required to look. Besides, I regard that which is written at the foot of the notice, as a mere mark or mode of identifying that paper, and the words "before me" need not have been written there at all.

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WIGHTMAN, J.—My only difficulty was, whether the words written by the commissioner at the foot of the annexed notice might not be used for the purpose of shewing that the affidavit was in fact sworn before the commissioner; but upon consideration I agree that to do so would lead to much difficulty and inconvenience, and that it is better to require that the jurat should be perfect in itself. It is not so in the present case, and the rule must be absolute.

Rule absolute.

COURT OF EXCHEQUER.

Trinity Term.

IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

1844.

WOOD v. PEYTON.

To a declaration containing two counts on two promissory notes, the defendant pleaded, "that the said notes, and each of them, were and was obtained by fraud:" Replication, "that the said notes were not obtained by fraud:" *Held*, on special demurrer, that the replication was good.

THE declaration in this case contained two counts by payee against maker of two promissory notes.

Plea, as to the first and second counts of the declaration, that the said promissory notes, and each of them, were and was obtained from the defendant by means of the fraud, covin, &c., of the plaintiff. Verification.

Replication, that the said promissory notes in that plea mentioned were not obtained by fraud, covin, &c., modo et formâ, &c.

Special demurrer, assigning for causes, that the replication is informal, and tenders too large an issue, inasmuch as it requires the defendant to prove that both the notes were obtained by fraud; also that the replication ought to have averred that neither of the said notes was obtained by fraud, covin, &c. Joinder in demurrer.

Lush, in support of the demurrer, was stopped by the Court.

Barstow, contra. The replication is distributable. The defendant has adopted a concise mode of pleading, and the plaintiff is at liberty to traverse in general terms the material allegation contained in the plea, without averring that each note was not obtained by fraud. Suppose an action

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second count mentioned was obtained by fraud," the plea would have divided itself. So the replication in which the plaintiff states that the notes were not obtained by fraud, is distributive also; for it is plain that the plaintiff means to follow the defendant in his pleading. The case of *Tuck v. Tuck* is beside the present question. This replication is the same in effect, as if it had contained the word "respectively." The defendant may amend by withdrawing the demurrer, otherwise there will be judgment for the plaintiff.

ALDERSON, B.—I am of the same opinion, although during the argument I entertained some doubt. If we are to take the plea to mean that both the notes were obtained by fraud, then the replication would mean that both were not obtained by that means. The reasonable construction both of the plea and replication is to consider the word "respectively" as introduced into each of them.

ROLFE, B., concurred.

Amendment accordingly.

WHITMORE and Another, Assignees of Loughton, a Bankrupt v. GREENE, Esq. and COTTAM.

An execution founded on a warrant of attorney, and complete by sale, prior to the issuing of a fiat, is protected by the 2 & 3 Vict. c. 29, notwithstanding the creditor before the sale had notice of an act of bankruptcy.

TROVER by the plaintiffs, as assignees of Loughton, a bankrupt. Pleas, not guilty and not possessed.

At the trial before Lord Abinger, C. B., at the Middlesex Sittings after Hilary Term, it appeared that the defendant Cottam was the execution creditor, and the defendant Greene the sheriff, who levied on the bankrupt's goods. On the 22nd May, 1843, the bankrupt gave a warrant of

The assignees of a bankrupt cannot maintain trover against an execution creditor who has not interfered in the sale of the bankrupt's goods. He is only liable in an action for money had and received.

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act of bankruptcy, is liable in trover. Secondly, the 2 & 3 Vict. c. 29, does not prevent the assignees from maintaining this action. The present case differs from *Whitmore v. Robinson* (a), and *Skey v. Carter* (b), in which cases the execution was not completed by sale prior to the issuing of the fiat. Here the sale took place before the fiat issued, though there was notice of the act of bankruptcy after the seizure and before the sale. The question depends upon the meaning of the 6 Geo. 4, c. 16, s. 108, which has not been repealed by the statute of Victoria: that section provides, that "no creditor having security for his debt, &c., shall receive upon any such security more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of the bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors." Under that section the dividing point is the act of bankruptcy, and if, as here, the seizure does not take place until after the act of bankruptcy, the property vests in the assignees. In *Wymer v. Kemble* (c), the seizure and sale were perfect and complete before the act of bankruptcy, and on that ground it was held that the defendant was not a creditor having security for his debt. They also cited *Godson v. Sanctuary* (d), and *Ramsey v. Eaton* (e).

Byles, Serjt., and *Cleasby* for the sheriff. The sheriff is not liable in trover, but is protected by the 2 & 3 Vict. c. 29. This is an attempt to defeat a bonâ fide execution, by a secret act of bankruptcy prior to the seizure. The statute of

(a) 1 Dowl. 135, N. S. ; See
S. C. 8 M. & W. 463.

(b) 2 Dowl. 831, N. S. ; See
S. C. 11 M. & W. 571 ; 5 Scott,
N. R. 877, n.

(c) 6 B. & C. 479.

(d) 4 B. & Ad. 255 ; See S. C.
1 N. & M. 52.

(e) 2 Dowl. 219, N. S. ; 10 M.
& W. 22.

Victoria is identical with the 82nd section of the 6 Geo. 4, c. 16, except that the former omits the provision as to the two months; therefore, the sheriff is now in the same position as if, under the latter act, a secret act of bankruptcy had been committed, and the two months had elapsed. If the words in the statute of Victoria "at the time of executing or levying such execution," mean at the time of seizure, the defendants are within the protection of that act. In *Godson v. Sanctuary* (a), Lord Denman, C. J., says, "after the decisions which have taken place on the subject, it would be impossible to contend that the seizure by the sheriff in this case was not a levying within the act." The true meaning of the 108th section of the 6 Geo. 4, c. 16, is, that the execution shall be defeated by the fiat, but not by a secret act of bankruptcy. The words used in that section are not before he "becomes bankrupt," but before "bankruptcy." No case has been cited in which the act of bankruptcy has been held to be the dividing line. Even before the statute of Victoria, the words "before bankruptcy," have been held to mean before the act of bankruptcy. All the cases since that statute treat the fiat as the dividing point. In *Whitmore v. Robinson*, Parke, B., says (b), "the effect of this provision seems to be, in case of bonâ fide contracts, pleadings, and executions, to do away with the relation to the act of bankruptcy, and to substitute the issuing of the fiat, for the act of bankruptcy, as the time at which the right of the assignees is to accrue." Similar language is used in *Ramsey v. Eaton*. Notice after seizure has no effect. [Parke, B.—All this difficulty has arisen from introducing into the 6 Geo. 4, a clause copied from an Irish act of Parliament.]

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Peacock, for the execution creditor, was stopped by the Court.

Cur. adv. vult.

(a) 4 B. & Ad. 260.

(b) 1 Dowl. 147, N. S.

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The judgment of the Court was delivered by
ALDERSON, B.—This was an action of trover brought by the assignees of one Laughton against the defendants, one of whom was the sheriff, and the other the execution creditor. The pleas were, not guilty and not possessed. The facts were these :—about the 22nd of May, 1843, Laughton gave a warrant of attorney to Cottam, on which a fieri facias issued on the 26th of May, and afterwards, but on the same day, an act of bankruptcy was committed by the execution of a bill of sale. On the morning of the 27th of May, the sheriff seized about nine o'clock, and after the seizure, about ten o'clock, a notice of the act of bankruptcy was given to the execution creditor. The sale took place on the 8th and 9th of June, and the fiat was issued in July, within two months of the warrant of attorney. A verdict passed for the plaintiffs, with liberty to the defendants to move on two points raised at the trial; first, on behalf of the execution creditor, that although he might be liable in an action for money had and received, he was not liable in trover as a wrong-doer: secondly, on behalf of both of the defendants, that the assignees could not maintain the action by reason of the statute of 2 & 3 Vict. c. 29.

On the first point, we think the rule for entering a verdict for the defendant Cottam, ought to be made absolute. It does not appear that he interfered or inter-meddled in the execution; he merely put the writ into the hands of the sheriff, and received a sum of money as the proceeds of the execution; and to make him liable in trover would be to make him responsible, not for the mere proceeds which he received, but for the entire value of the goods, including the poundage to the sheriff. We think there is neither principle nor authority for such a doctrine. In the cases cited at the Bar, of *Menham v. Edmonson* (a), and *Rush v. Baker* (b), the ground on which it was held, that the assignees could sue an execution creditor, was, in the latter case, that the defendant had given a bond, and in the former, that he was present at the time of the execution;

(a) 1 B. & P. 369.

(b) 2 Str. 996.

but in this case there has been no interference of any sort by the execution creditor, and, therefore, although he may be liable to refund the money paid to him, we think he cannot be sued in trover as a wrong doer.

The case of the sheriff is different. It was decided, in the case of *Balme v. Hutton* (a), that a sheriff, who, under a writ of fieri facias, seizes and sells the goods of a bankrupt before the commission, but after an act of bankruptcy, without notice of the act of bankruptcy, was liable in trover to the assignees. The sheriff would, therefore, be held liable in trover, unless protected by some statute. In the case of *Cheston v. Gibbs* (b), it was decided, that if the sale took place after the fiat, the sheriff was liable in trover. The question, therefore, is, whether it makes any difference that the sale was, as in this case, before the fiat, but after the act of bankruptcy, and after notice of such an act to the execution creditor. It was, we think, correctly observed in that case, that the operation of the writ was affected by words, applying to the creditors only. It has also been decided in *Whitmore v. Robinson*, (c) and confirmed in *Shey v. Carter* (d), that the 108th section of 6 Geo. 4, c. 16, has not been repealed by the 2 & 3 Vict. c. 29, and that the issuing of a fiat before sale, disentitles the execution creditor to the benefit of the execution. The actual sale and not the seizure is also made the dividing point in *Wymer v. Kemble* (e). The question, therefore, is, whether the sheriff is a wrong doer, if having under an execution and a judgment and warrant of attorney, seized goods after an act of bankruptcy, but before notice thereof to the execution creditor, he sells after such a notice, but before the fiat. The answer to that question depends on the construction of 2 & 3 Vict. c. 29. The judgment in the two cases of *Whitmore v. Robinson* and *Shey v. Carter*, having determined that the 108th section of 6 Geo. 4, c. 16, is not repealed by that statute, but continues in force; the effect of the statute of Victoria is to substitute

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(a) 3 M. & Scott, 1.

(b) *Ante*, Vol. 1, p. 420; S. C. 12 M. & W. 111.

(c) 1 Dowl. 135, N. S.; See S. C. 8 M. & W. 463.

(d) 2 Dowl. 831, N. S.; See

S. C. 11 M. & W. 571; 5 Scott. N. R. 877, n.

(e) 6 B. & C. 479.

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its enactment for the 81st section of the 6 Geo. 4, as well as for the 82nd. Reading then the two statutes together, the result is, that all executions, whether judgments on warrants of attorney, or by confession, or nil dicit, executed by seizure after an act of bankruptcy, but without notice of it to execution creditors, are rendered valid so far as they are affected by the act of bankruptcy committed before seizure. The effect of priority of the act of bankruptcy is done away with, although that act is still operative to support the commission; and the question in each case is, whether the particular execution is one that but for a prior act of bankruptcy, would have entitled the execution creditor to a preference? If the fiat intervenes before the sale, the execution plaintiff is not entitled, because he was still a creditor of the bankrupt at the time of the fiat, which must now be considered as identical with the time of bankruptcy; and the priority of the act of bankruptcy to seizure being done away with, he is consequently within the proviso of the 108th section, and is only to be relieved rateably. If the fiat is after the sale, the execution plaintiff is no longer a creditor of the bankrupt at the time of the bankruptcy, and is entitled to the preference which his execution gives him. Here the sale occurs before the fiat, and, consequently, the execution plaintiff is entitled to the benefit of this execution; unless the fact that there was notice of act of bankruptcy prior to the *sale*, makes any difference. It would have been very right for the Legislature to have enacted with respect to executions, that an act of bankruptcy should not operate until the time that the execution creditor had notice of it, and should have the effect then of an act of bankruptcy at that time; and then no doubt, the act of bankruptcy in that case, would date from the time of the notice, and so would defeat the execution, because at the time of the bankruptcy, the execution plaintiff would still have been a creditor: but the Legislature has not done this, the enactment of the statute of Victoria says, that the act of bankruptcy, prior to the executing and levying, that is, prior to seizure, shall have no effect, provided the execution creditor had not notice at the time of the seizure—

and this execution plaintiff is in that condition. To hold that he was deprived of his priority, would be to substitute different words from those in the statute. The argument before us for the plaintiffs was, that the execution was invalidated, because the execution plaintiff had notice before sale, and therefore before execution levied: certainly, if this construction could be supported, the argument would avail, but considering the ground on which the Court of error proceeded in *Skey v. Carter* (a), we think this view of the case cannot be supported. The second and main ground of argument was, that the 108th section not being repealed, the execution on the warrant of attorney was altogether unaffected by the statute of Victoria, just as if no such statute had passed; and that such execution would be altogether inoperative, if the sale took place after an act of bankruptcy whenever committed, and whether there was any notice of it or not; just as if the proviso of the 108th section were contained in a separate statute, and alone gave the law as to executions on warrants of attorney. But this argument cannot be sustained consistently with the reasoning both of this Court, and of the Court of error, in the cases of *Whitmore v. Robinson* and *Skey v. Carter* (b), nor with the decisions of this Court in *Ramsey v. Eaton* (c); nor indeed with that of the Queen's Bench in *Godson v. Sanctuary* (d), in which case, the judgment on a warrant of attorney was held to be within the 81st section, and protected notwithstanding a prior act of bankruptcy, if the seizure took place more than two months before the fiat; and not held to be merely void, because the sale took place after an act of bankruptcy, which, on the supposition that the 108th section remained unqualified, and regulated all executions on warrants of attorney, would have been the case. We, therefore, think that the sheriff was not a wrong doer in this case, and, consequently, that the rules must be made absolute.

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Rules absolute.

(a) 2 Dowl. 831, N. S.; See
S. C. 11 M. & W. 571; 5 Scott's
N. R. 877, n.

(b) 1 Dowl. 135, N. S.; See S.
C. 8 M. & W. 463.

(c) 2 Dowl. 219, N. S.; 10 M.
& W. 22.

(d) 4 B. & Ad. 255; See S. C.
1 N. & M. 52.

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STURTON v. RICHARDSON.

In an action by a tenant in common against his companion, under the 4 Ann. c. 16, s. 27, the declaration must allege that the defendant has received more than his share of the rent.

THE declaration stated, that whereas the plaintiff, one William Lockhart, in right of Elizabeth, his wife, one Harriet Morley, and the defendant, heretofore, to wit, on the 30th day of September, 1838, and from thence continually until the 29th of September, 1842, were possessed individually of certain messuages and hereditaments, with the appurtenances, for the residue of a certain term of years, then and during all the time aforesaid to run and unexpired, and which has lately, to wit, on the 29th of September, 1842, expired and been determined; that is to say, the plaintiff was possessed of, and in one undivided third part thereof, the said William Lockhart, in right of Elizabeth, his wife, was possessed of, and in one other undivided third part thereof, the said Harriet Morley was possessed of, and in one other undivided sixth part thereof, and the said defendant was possessed of, and in the remaining undivided sixth part thereof; and the defendant, during all the time aforesaid, had the care and management of the whole of the said messuages and hereditaments, to receive and take the rents, issues, and profits thereof, to the common profit of them, the said plaintiff, William Lockhart, Harriet Morley, and himself the defendant, and as bailiff of the plaintiff, of what he received more than his just share and proportion thereof, to render a reasonable account to the plaintiff, and of his share thereof, when he, the defendant, should be thereunto afterwards requested, according to the form of the statute in such case made and provided; yet the defendant, (although often requested so to do,) hath not rendered any reasonable account, &c. Special demurrer and joinder.

Greenwood, in support of the demurrer. First, it does not appear whether the defendant is charged as receiver at common law, or as bailiff under the statute 4 Ann.

c. 16, s. 27 (a). The declaration should have alleged a special appointment, for otherwise no action lies at common law by one joint-tenant or tenant in common against his companion. If it is intended to proceed under the statute, (which seems probable, as reference is made to it,) the declaration is bad for want of an averment that the defendant received more than his just share or proportion. The case of *Wheeler v. Horne* (b), is an express authority to that effect, and all the precedents contain such an averment. Secondly, the non-joinder of parties who ought to have been plaintiffs, is apparent on the face of the declaration; all the tenants in common should have sued, *Baxter v. Hozier* (c).

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Archbold, contra. The declaration is framed upon the statute 4 Ann. c. 16, s. 27, under which it is submitted, that a joint-tenant or tenant in common may sue his companion as bailiff at common law. In an action against a bailiff at common law, it is not necessary to allege that he has received anything, although a different rule prevails when the action is against a receiver. The office of bailiff carries with it the duty of accounting before auditors, when called on, whether any act has been done by him or not; and if any money has been received by him, to pay it over

(a) Enacts, "That actions of account shall and may be brought and maintained against the executors and administrators of every guardian, bailiff, and receiver; and also by one joint-tenant, and tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint-tenant, or tenant in common; and the auditors appointed by the Court, where such

action shall be depending, shall be, and are hereby empowered to administer an oath, and examine the parties touching the matters in question, and for their pains and trouble in auditing and taking such account, have such allowance as the Court shall adjudge to be reasonable, to be paid by the party on whose side the balance of the account shall appear to be."

(b) Willes, 208.

(c) 5 Bing. N. C. 288; See S. C. 7 Scott, 233.

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to his principal (a). The question then turns upon the construction of the statute. It is a remedial act, and the Court will construe it so as to obviate the inconvenience which formerly prevailed. Before that act, a joint-tenant or tenant in common, could not sue his companion at law; but was driven to a Court of equity to compel an account. The obvious intent of the act was to afford a remedy by giving an action at common law; and if, in order to maintain such an action, it is held requisite to allege and prove that the defendant received more than his just share, the statute would become a dead letter; for in most cases, it would be impossible to ascertain the fact, without filing a bill in equity. The statute expressly says, that a joint-tenant, or a tenant in common, may maintain an action against his companion, as bailiff; the clear meaning of which is, that he may sue him as a bailiff at common law, and compel him to account before the auditors, and if he has received more than his share, to refund it. The case of *Wheeler v. Horne* (b), may seem an authority to the contrary, but the inconveniences likely to result from a strict construction of the statute, do not appear, in that case, to have been considered by the Court. As to the objection of the non-joinder of plaintiffs, a joint-tenant, or tenant in common, may maintain a personal action without joining his companions; and a lease by two joint-tenants, or tenants in common, does not operate as a joint lease of both, but as a separate lease by each, with a confirmation by his companion.

POLLOCK, C. B.—The defendant is entitled to our judgment. It has been argued that the plaintiff under this statute may sue the defendant, as he might have sued a bailiff at common law; and a distinction was sought to be drawn between a proceeding as against a bailiff, and a receiver. But the judgment of the Court in the case of

(a) Scw. N. P. 2, n. 2.

(b) Willes, 208.

Wheeler v. Horne, is an express authority against that position. There Lord Chief Justice *Willes*, in delivering his judgment, says, "though an action of account therefore may be brought by one tenant in common against another since the statute, yet it is an action of a very different nature from an action of account against a bailiff at common law; a bailiff at common law is answerable not only for his actual receipts but for what he might have made of the lands without his wilful default, as is expressly held in *Co. Litt.*, 172, *a*, and in many other books: but by the plain words of the statute a tenant in common, when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion." But the judgment does not stop there. The Chief Justice goes on to say, "as the judgment in both actions must be in general quod computet, how can the auditors tell in what manner he is to account, or whether they are to examine on oath or not, unless it appear by the record in what capacity he is sued and what sort of action this is? It was said that such a suggestion might be made on the record: but I believe no such suggestion was ever heard of. But the declarations since the statute have always set forth that the plaintiff and defendant are tenants in common, and that the defendant has received more than his share." So, in the present case, the declaration is bad, inasmuch as it does not contain any allegation that the defendant has received more than his share. The case of *Wheeler v. Horne* was decided more than a hundred years ago; and as no subsequent authority at variance with it has been cited, we think we ought to abide by that decision. Besides, the very words of the statute, only gives the action against a party "for receiving more than his share." We think that the plaintiff cannot sue this party, and compel him to account as a bailiff generally, and consequently this declaration is bad.

ALDERSON, B.—I am of the same opinion. In the note by Mr. Hargrave to *Co. Litt.*, 172, *a*, *n.* (8), it is said,

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"now, one joint-tenant or tenant in common, may have account against the other as bailiff, for receiving more than his share of profits, although there is no appointment of him as bailiff. (See 4 Ann. c. 16, s. 27)." If, therefore, the plaintiff is suing the defendant as bailiff at common law, he is bound to shew an appointment as bailiff; if he is proceeding under the statute, the declaration should have alleged that the defendant received more than his share. The declaration says, that "it was the defendant's duty to render an account of what he had received more than his share;" but it does not, by any averment, shew that the defendant has not performed that which is alleged to be his duty. It is only said, that he has not accounted; but if he has not received more than his share, he has nothing to account for.

GURNEY, B., and ROLFE, B., concurred.

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Where a plaintiff succeeds in ejectment, and the costs are taxed, he cannot, in an action for mesne profits, recover more than such taxed costs; notwithstanding the taxation took place at the instance of the defendant.

TRESPASS for mesne profits. Plea, of payment into Court, and no damages ultra. Replication, damages ultra; upon which issue was joined.

At the trial before *Wightman*, J., at the last Dorsetshire assizes, it appeared that on the first trial of the ejectment, the plaintiff had been improperly nonsuited, and that the nonsuit was afterwards set aside and a new trial granted, on the ground of misdirection. The cause went down a second time for trial, when the plaintiff obtained a verdict. The defendant afterwards obtained an order of *Rolfe*, B., to enter satisfaction on the judgment on payment of one shilling damages, unless the lessors of the plaintiff should proceed to tax their costs within a month. That order was afterwards set aside, on the ground that it was made without authority (*a*). The plaintiff having brought the present

(*a*) 11 M. & W. 80.

action for mesne profits, the defendant, on the 2nd Febr. 1843, applied to *Parke*, B., at Chambers, who thereupon made the following order:—

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“Upon hearing, &c., I do order that the attorney for the lessors of the plaintiff shall deliver unto the defendant's attorney a bill of costs in this action; and that the same, when delivered, be referred to the Master to be taxed, the defendant hereby undertaking to pay the amount found due in four days after taxation; such delivery and taxation to be without prejudice to the right (if any) which the lessors of the plaintiff would have had, on recovering in an action for mesne profits more than the costs between party and party, if the costs had not been taxed; the amount of the bill so taxed, not to be included in the action for mesne profits.”

The costs were taxed under this order and duly paid by the defendant, and the sum paid into Court covered the amount of rent. But it was contended, on the part of the plaintiff, that he was entitled to recover in the present action full costs as between attorney and client, and also the costs of the nonsuit. The learned Judge reserved the point, and a verdict was found for the plaintiff, leave being reserved for the defendant to move to enter a nonsuit or a verdict for him, or to reduce the damages to such amount, or according to such principle, as the Court should determine.

A rule nisi having been obtained accordingly,

Cockburn and *Hodges* shewed cause. The plaintiff is entitled to recover costs as between attorney and client. In *Nowell v. Roake* (a), it was held that in an action for mesne profits, the plaintiff might recover by way of damages costs, as between attorney and client, incurred by him in a Court of error in reversing a judgment in ejectment obtained by the defendant. [*Pollock*, C. B.—At that time,

(a) 7 B. & C. 404; See S. C. 1 M. & R. 170.

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a court of error could not award costs to a plaintiff in ejectment.] So here, the new trial being granted on the ground of misdirection, the plaintiff was entitled to his costs. After judgment by default in ejectment, the plaintiff in an action for mesne profits may recover all the expenses which he has necessarily been put to by the ejectment, and is not limited to the taxed costs as between party and party, *Doe v. Huddart* (a). [Alderson, B.—In that case the jury were compelled to tax the bill, as the officers of the Court could not tax costs against the casual ejector.] In *Symonds v. Page* (b), the defendant appeared and pleaded to the ejectment, but at the assizes withdrew his plea, and undertook to deliver immediate possession; and it was held that in an action for mesne profits the plaintiff might recover the costs of the ejectment, although no costs had been taxed by the Master. [Pollock, C. B.—That case is no authority to shew that a jury may give more than the amount at which the costs have been taxed. Alderson, B.—The opinion of Lord Kenyon in *Doe v. Davis* (c), is against you.] In the present case, the costs were not taxed by the plaintiff, but by the defendant. *Sandback v. Thomas* (d), and *Gould v. Barratt* (e), are in point. They also cited *Sparkes v. Martindale* (f), *Smith v. Compton* (g), *Goodtitle v. Tombs* (h), *Grace v. Morgan* (i), *Aslin v. Parkin* (k).

Crowder and *Barstow* were not called upon to support the rule.

POLLOCK, C. B.—The rule must be absolute to enter a nonsuit. It must, however, be admitted, that the authorities on this point are not uniform. In *Grace v. Morgan, Tindal*, C. J., says, “It may be observed that all the cases

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| (a) 2 C., M. & R. 316; See S. | (f) 8 East, 593. |
| S. 4 Dowl. 437. | (g) 3 B. & Ad. 407. |
| (b) 1 C. & J. 29. | (h) 3 Wils. 118. |
| (c) 1 Esp. 358. | (i) 2 Bing. N. C. 534; See |
| (d) 1 Stark. N. P. C. 306. | S. C. 2 Scott, 790. |
| (e) 2 M. & Rob. 171. | (k) 2 Burr. 665. |

relied on by the plaintiff, as authority that the full costs of the former action are recoverable in a subsequent suit for vexatiously prosecuting the former action, are cases where there has been no taxation of costs in the former action; such as ejectment, where the judgment was obtained by default against the casual ejector; or formedon, where no costs are given, in which cases the plaintiff must recover his full expenses if he is entitled to recover any. But in ejectment, where the action has been defended and the costs taxed, he is not allowed to recover the extra costs in a subsequent action, *Doe v. Davis*." The case of *Doe v. Hare* is to the same effect. It has been argued, that a plaintiff in ejectment is entitled to a full indemnity; but there is no reason why he should be in a better situation than any other plaintiff. Actions for malicious injuries are, perhaps, an exception; for there juries have been allowed to take all the circumstances into consideration, and to give what are termed vindictive damages; but it is not so with respect to ejectment. A distinction has been attempted to be drawn, on the ground that these costs were taxed at the instance of the defendant, and consequently, that the plaintiff was not bound by the taxation, and might recover beyond the taxed costs. I cannot, however, assent to that view of the case. The Judge, by making the order, merely directs the costs to be taxed, but does not say what the effect of that taxation is to be; and it is difficult to see why a plaintiff in ejectment should obtain more costs than a plaintiff in trespass, or in any other action. The taxed costs are considered as a fair indemnity; if they are not so, the rules which govern taxation ought to be altered. We must be bound by the decided cases, for it would be most inconvenient if the jury were allowed to give or withhold costs at their discretion.

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ALDERSON, B.—I am of the same opinion. The plaintiff in ejectment is entitled to recover such damages as he has sustained, and since the defendant's misconduct consisted

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in turning him out of possession, the defendant must pay back all the profits of the estate during the time he has so kept him out. The taxed costs are intended to be a full indemnity to the plaintiff, for his expenses in getting back the land. That is the principle upon which they are given; whether it be fully carried out in practice is another matter. The question is, what is to be the criterion by which the costs of getting back the land are to be estimated? A plaintiff in ejectment is in the same situation as other suitors, all of whom sue for their rights and obtain costs as an indemnity; and as other plaintiffs submit to have their costs taxed, so ought a plaintiff in ejectment. If the taxed costs be not a full indemnity, they ought to be made so.

GURNEY, B., concurred.

ROLFE, B.—I am of the same opinion. Here a taxation has taken place in the usual way, and by that the plaintiff is bound. Where indeed there has been no taxation, then, *ex necessitate*, the jury must say what is to be an indemnity.

Rule absolute to enter a nonsuit.

GRIFFITH v. OWEN.

To assumpsit for breach of contract in not returning certain promissory notes, the defendant pleaded that after breach, he delivered to the plaintiff at his request, and "for and on account of the said notes, and of the promise and damages in respect thereof;" an order in writing directed to B., in whose hands the notes were, whereby the defendant requested B. to deliver to plaintiff the said notes; that plaintiff took the order "for and on account of the notes, and of the promise and damages;" that B. was always ready to deliver the notes to plaintiff upon the order being presented to him, but that plaintiff did not present the same within a reasonable time, but kept the order without making any application to B. for the notes, until the same were, without any default of the defendant, feloniously stolen from the possession of B. : *Held*, on special demurrer, a bad plea of accord and satisfaction.

ASSUMPSIT. The declaration stated, that before the making of the promise, &c., the plaintiff was the bearer of six promissory notes respectively, made by certain persons, to wit, John Waters, Arthur Jones, and David Jones, for the payment of 5*l.* each, and respectively payable to the

plaintiff at his request, and "for and on account of the said notes, and of the promise and damages in respect thereof;" an order in writing directed to B., in whose hands the notes were, whereby the defendant requested B. to deliver to plaintiff the said notes; that plaintiff took the order "for and on account of the notes, and of the promise and damages;" that B. was always ready to deliver the notes to plaintiff upon the order being presented to him, but that plaintiff did not present the same within a reasonable time, but kept the order without making any application to B. for the notes, until the same were, without any default of the defendant, feloniously stolen from the possession of B. : *Held*, on special demurrer, a bad plea of accord and satisfaction.

bearer on demand: that the defendant was indebted to the said J. Waters, A. Jones, and D. Jones, in a certain amount exceeding the sum of 30*L*., the full amount of which debt is to the plaintiff unknown; and thereupon heretofore, to wit, &c., in consideration that the plaintiff would deliver to the defendant the said notes, in order that the defendant might become the bearer thereof, and might as such bearer endeavour to set off the amount of the said notes against an equal or some portion of the debt so due from the defendant, he the defendant promised the plaintiff, that he the defendant would return the said notes to the plaintiff, when he the defendant should no longer have any use for them, for the purpose aforesaid, in case he should not then have effected any such set off: which said promise having been so made, thereupon afterwards, to wit, on, &c., the plaintiff relying on the said promise, delivered to the defendant the said notes, in order that he the defendant might become the bearer thereof, and might as such bearer endeavour to set off the amount of the said notes, against an equal or some portion of the said debt; and the defendant then received the said notes from the plaintiff upon the terms aforesaid, and thereby then became the bearer thereof. And although afterwards and after the said promise, delivery, and receipt, and long before the commencement of this suit, to wit, on, &c., he the defendant had no longer any use for the said notes, for the purpose aforesaid, and had not then effected any such set off as aforesaid, (of all which the defendant then had notice); and although a reasonable time for the defendant to return the said notes to the plaintiff had elapsed, since the defendant had no longer any use for the same as aforesaid, and before the commencement of this suit; and from the time when the defendant had no longer any use for the same as aforesaid, to the expiration of such reasonable time as aforesaid, and from thence to the commencement of this suit, the plaintiff was ready and willing to receive the said notes from the defendant, of which the defendant then had due notice.

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Yet the defendant has disregarded his said promise, and did not when he had no longer any use for the said notes as aforesaid, or within such reasonable time as aforesaid, or at any other time, return the said notes, or any or either of them to the plaintiff; but has wholly omitted and neglected so to do; whereby the plaintiff has wholly lost the said notes, the same being of great value, to wit, of the value of 30*l*.

Plea, that after the breach of the said promise, and before the commencement of this suit, to wit, on, &c., the defendant delivered to the plaintiff at his request, and for and on account of the said notes, and the said promise and damages in respect thereof, a certain order in writing, signed by the defendant, and directed to one P. Brown, in whose hands the said notes then were, whereby the defendant requested the said P. Brown to deliver to the plaintiff the said notes; and the plaintiff then took and received the said order for and on account of the said notes, and the said promise and damages: that the said P. Brown was always from the time of the delivery to the plaintiff of the said order as herein-before mentioned, until the loss of the said notes hereinafter mentioned, ready and willing to deliver up the said notes to the plaintiff upon the said order being presented to him the said P. Brown for that purpose; and that the said promissory notes would in fact have been given and delivered up by the said P. Brown to the plaintiff, under and in pursuance of the said order, had the said order been presented to the said P. Brown, within a reasonable time after such delivery thereof to the plaintiff as aforesaid; but that the plaintiff did not nor would present or cause to be presented, the said order to the said P. Brown, within such reasonable time as aforesaid; but then wholly neglected and refused so to do, or to take any steps or any means to endeavour to procure the delivery of the said notes to him from the said P. Brown; and negligently held and retained the said order for a long and unreasonable time, to wit, for the space of one year after the delivery thereof to him as aforesaid, without making

any application either upon the said order or otherwise, to the said P. Brown for the said notes, and until the said notes were afterwards, and before the commencement of this suit, to wit, on, &c., without any default in the defendant, feloniously stolen from and out of the possession of the said P. Brown, and became, and were, and are wholly lost. Verification.

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Special demurrer, assigning for causes (amongst others) that even if the order had been presented and the notes delivered up by the said P. Brown, there is no proper averment in the plea to shew that such delivering up, was to be a satisfaction of the previous damages, and the complete cause of action confessed: that the delivering up of the notes which were the plaintiff's own notes, would not in law have been a satisfaction of the previous damages, and complete cause of action confessed: that it is not sufficiently stated in what respect there was negligence in the plaintiff, or how or why the matters alleged against the plaintiff, as negligence, were or are to be considered as having amounted to negligence.

E. V. Williams, in support of the demurrer. The plea admits that a reasonable time for the redelivery of the notes had elapsed, and that the defendant had failed to perform his part of the contract, but contains no averment that the order was given by way of accord and satisfaction. In *Com. Dig.* tit. "*Accord*." (B. 1), it is said, "an accord, that makes a good plea, must be in full satisfaction of the thing demanded." "It is no plea in an action of trespass, that it was agreed between the plaintiff and the defendant, that the goods, which the latter had taken from the former should be restored, and that they were restored: for by the restoration of the goods no satisfaction was made for the tort in taking them." *Bac. Abr.* tit. "*Trespass*." (L. 3). Upon the same principle, it has been held, that an action on the case lies for distraining for more rent than is due, although the distress taken is not sufficient to pay the rent due,

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Taylor v. Henniker (a). So, where to an action against magistrates for trespass and false imprisonment, they pleaded a charge preferred before them for an offence against the Toleration Act (1 Wm. & M. c. 18, s. 18), and a commitment for want of sureties, and that before the next sessions, it was agreed between the prosecutor and the plaintiff, with the consent of the defendant, that the prosecution should be dropped, and the plaintiff discharged at the sessions for want of prosecution; that the plaintiff was, accordingly, then and there discharged, in full satisfaction of the assault and imprisonment: that was held no legal satisfaction, *Edgcombe v. Rodd* (b). Perhaps it will be said that this case comes within the principle of *Kearslake v. Morgan* (c), in which it was held, that to assumpsit for goods sold and delivered, the defendant, who was payee of a promissory note, might plead that he indorsed it to the plaintiff "for and on account" of the said debt. But that case proceeds upon the ground that the acceptance of a negotiable instrument must be taken *prima facie* to be in satisfaction of the debt; for the presumption is, that the plaintiff has transferred it to other hands. A creditor who accepts from his debtor a draft upon a third person, and holds it an unreasonable time before he demands payment, thereby discharges the latter from the debt; although the draft was not a bill of exchange, or negotiable, *Chamberlyn v. Delarive* (d).

Whitehurst, *contra*. The argument on the other side proceeds upon the fallacy that this is a plea of accord and satisfaction; but the plea, in substance, is, that the plaintiff, by his own act, has discharged the defendant from his breach of duty. *Chamberlyn v. Delarive* is precisely in point. [*Pollock*, C. B.—There is no doubt if a debtor gives a check, and the creditor keeps it an unreasonable time, and then the bank breaks, the debt is discharged;

(a) 12 A. & E. 488; S. C. 4 Smith, 515.
 P. & D. 242. (c) 5 T. R. 513.
 (b) 5 East, 294; See S. C. 1 (d) 2 Wils. 353.

but the question is, in what form must those facts be pleaded?] There is no precedent of such a plea by way of accord and satisfaction, and *Kearslake v. Morgan* shews, that it is sufficient to state that the order was delivered "for and on account" of the notes, and of the promise and damages. [*Parke, B.*—If this be a good plea in respect of these notes, the same form of plea would be equally good as to any other order; for instance, if the plea were, "that for and on account of the said notes and damages, the defendant delivered to the plaintiff an order to get a certain quantity of goods."] In that case the negligence of the plaintiff might preclude him from recovering, *Coles v. The Bank of England* (a). In *Bunney v. Poyntz* (b), the delivery of a promissory note, which was outstanding in the hands of a third party, was considered as payment. In *Sard v. Rhodes* (c) the same fact was pleaded in accord and satisfaction. [*Alderson, B.*—*Kearslake v. Morgan* was decided on the authority of *Richardson v. Rickman* (d); and there Lord *Mansfield* said, "that a bill of exchange, unless there were an agreement that it should be so, was no satisfaction; but that this was a bill accepted by the party, and negotiable, and that was payment." *Parke, B.*—The distinction is this, if a man takes the horse of another, and afterwards re-delivers it, the latter has still a right of action, and the re-delivery only goes in mitigation of damages. But if a man owes another a hundred pounds, and the latter takes an order in respect of that debt, he may, by his laches, make the order his own. In trover, a re-delivery of the chattel affords no answer to the action, but in the case of a contract which relates to money only, payment is an answer. With respect to goods, I do not understand how one thing can be given for another, unless by way of accord and satisfaction.]

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(a) 10 A. & E. 437; See S. C.
 2 P. & D. 521.

(b) 4 B. & Ad. 568; See S. C.
 1 N. & M. 229.

(c) 1 M. & W. 153; See S. C.
 4 Dowl. 743.

(d) Cited in *Kearslake v.*
Morgan, 5 T. R. 517.

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E. V. Williams, in reply. *Chamberlyn v. Delarive* is distinguishable, for when a person receives an order for the payment of money, the law merchant casts upon him the duty of presenting it within a reasonable time. It is consistent with everything alleged in this plea, that the plaintiff might have protested against the order being received in satisfaction. (He was then stopped by the Court.)

POLLOCK, C. B.—I think the plea is bad. *Chamberlyn v. Delarive* (a), and *Kearslake v. Morgan* (b), establish this,—that in the case of a money demand, if the party accepts a promissory note or order, that is a sort of qualified or conditional payment, and may be used as such. This plea is, in effect, an attempt to extend to other matters, the rule which applies merely to money demands. To an action for money a party may plead payment, and, therefore, it is clear, he ought to be allowed to plead anything which is equivalent to payment, and which the parties agree at the time shall be considered as payment. But it would be a very different matter if such pleas were pleaded in other causes of action, not for a money demand, but for damages; for instance, for the non-delivery of goods. In such case, notwithstanding the subsequent delivery of the goods, the right of action still remains for damages, in respect of having carried the goods away. If then, a re-delivery of the goods would not afford an answer to the action, unless there was an accord and satisfaction; how, in this case, can a mere order to obtain them from a third person do so? There must be judgment for the plaintiff.

ALDERSON, B.—I think this is a bad plea of accord and satisfaction.

ROLFE, B., concurred.

Judgment for the Plaintiff.

(a) 2 Wils. 353.

(b) 5 T. R. 513.

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TURNER and Another, Assignees of EDWARD GIBSON, a Bankrupt, v. The Mayor and Corporation of KENDAL.

THIS was an action for work and labour, goods sold, &c., in which a rule nisi had been obtained under the first section of the Interpleader Act (1 & 2 Wm. 4, c. 58.) It appeared, from the affidavits, that certain work, to the amount of 70*l.* 10*s.*, had been done for the defendants in the repair of the Town Hall of Kendal, by one Edward Gibson, who was stated to have been employed by the defendants to do the work. That Gibson had since become bankrupt, and that the present action was, therefore, brought by his assignees. At the same time, one Christopher Gibson, the son of Edward Gibson, gave notice to the defendants that he had done the work, and claimed the above amount. The present rule was, therefore, obtained, calling on Christopher Gibson to appear and state the nature and particulars of his claim.

The Interpleader Act does not apply to adverse claims set up in respect of a sum of money due upon a contract for work and labour.

Jervis, for C. Gibson (on the last day of Term) shewed cause. This is not a case in which there can be an interpleader. It cannot be said that the defendants do not claim any interest in the subject matter of the suit. It is not like the case of a specific chattel, or of a stake or deposit; here it is a mere chose in action; the persons who have made the contract do not know with whom they have made it. [*Parke*, B.—The case is somewhat similar to that of a claim of rent, where there is a dispute about the reversion.]

Cardwell, for the assignees, urged that a party was bound to know with whom he contracted; and that under these circumstances, a Court of equity would not allow a bill of interpleader.

Cowling, for the defendants. This is not a claim for un-

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liquidated damages, but for the value of certain work done for the defendants, the amount of which is agreed upon by all parties; and the only question is, to whom is it payable? The defendants have no interest in the subject matter of the suit, inasmuch as they admit that they are bound to pay one party or the other. [*Alderson*, B.—The defendants have committed a breach of contract with one or the other; that is altogether different from the case of money deposited in the hands of a third party.] The statute would seem to have contemplated a case of this description, for it mentions the actions, assumpsit, and debt. It is frequently very difficult to know the parties to a contract. In the case of *Skinner and Others v. Stocks* (a), the contract was made with one of the plaintiffs only, but it was held that the parties really interested might sue. So in this case, if the son did the work, the question would be, whether it was done on his own account, or on behalf of his father? [*Parke*, B.—*Primâ facie* the party giving the order is the contracting party on the one side, and the party doing the work the contracting party on the other. *Rolfe*, B.—Is there any instance of an interpleader, because a party did not know with whom he contracted?] In the case of a wager it may be equally said, that the stakeholder ought to know with whom the wager was laid. [*Alderson*, B.—In that case he makes the contract with the winner.] The Court will not introduce nice distinctions into an act intended for the relief of parties. [*Parke*, B.—The observations of Lord *Cottenham*, in the case of *Crawshay v. Thornton* (b) shew that there cannot be an interpleader in this case. Suppose the one party claimed 80*l.* and the other 70*l.* only.] It is conceded that a difficulty would arise if different amounts were claimed, but that is not so in this case.

PARKE, B.—It is exceedingly doubtful whether a motion of this sort ought to be heard the last day of Term. But

(a) 4 B. & A. 437.

(b) 2 Myl. & Cr. 1.

in my opinion this is not a case within the statute. Where a party who enters into a contract does not know with whom he has contracted, it is his own fault. It is different where, in consequence of bankruptcy or insolvency, a party comes to the Court to help him out of an uncertainty. If counsel will consent that the Court shall take time to consider, we will give our judgment on a future day ; otherwise the rule will be discharged.

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Counsel having refused to consent, the rule was discharged.

Rule discharged.

MORRISH v. MURRAY and Another.

TRESPASS for breaking and entering the plaintiff's dwelling-house, forcing and breaking open divers outer and inner doors, and entering and searching divers rooms and apartments of the plaintiff.

The defendants pleaded ; first, not guilty ; secondly, not possessed ; and thirdly, as to breaking and entering the house, and forcing open the inner doors and searching the rooms of the plaintiff ; the defendants justified as officers of the sheriff of Somersetshire, under a writ of testatum capias ad satisfaciendum, against one Caroline Frost, by virtue whereof they quietly entered the house of the plaintiff, the outer door thereof being open, and searched for the said Caroline Frost : that for six months next preceeding the trespasses, the said Caroline Frost had resided in the plaintiff's house, and that at the time of the trespasses, the defendants had good ground to suspect and believe, and did

In trespass for breaking and entering the plaintiff's dwelling-house, &c., defendants justified the breaking and entering, and forcing open the inner doors and searching the rooms of the plaintiff, as officers of the sheriff, under a ca. sa. against C. F. ; that for six months before the trespasses, C. F. had resided in the plaintiff's house ; and that at the time of the trespasses, the

defendants had good ground to suspect and believe, from the information of the attorney who sued out the writ, that C. F. was then in the house. At the trial, the learned Judge expressed his opinion that the plea afforded a defence ; but said he would direct the jury to assess damages, in case the Court should be of a different opinion. The jury assessed the damages at one farthing.

Held, that the plea afforded no defence ; but that neither party having objected to the contingent assessment of damages, the plaintiff was not entitled to a new trial, on the ground of misdirection.

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actually suspect and believe, from information furnished to them by the attorney of the party, who had sued out the writ, that the said Caroline Frost was then in the said house.

The plaintiff replied, taking issue on the two first pleas; and to the third, (protesting the suing out, indorsement, and delivery of the writ to the sheriff, &c.), he replied *de injuriâ*, &c.

At the trial before *Cresswell*, J., at the Somerset Spring Assizes, it appeared that Caroline Frost, against whom the writ of *capias* issued, had resided at the plaintiff's house shortly before the committal of the trespasses, and that the defendants had reason to suspect she was then there, and for the purpose of arresting her, entered the house by the outer door, which was open, and broke open certain inner doors. But the defendants did not prove that they had received information from the attorney of the party issuing the writ, that Caroline Frost was then in the house. It was submitted, on behalf of the plaintiff, that the plea afforded no answer, and that the defendants had failed to prove it. The learned Judge was of opinion that the plea was proved, and constituted a good defence to the action. He then stated that he should direct the jury to say what damages the plaintiff had sustained by reason of the trespasses, in the event of the Court being of opinion that the plea was not a defence, and would give the plaintiff leave to enter a verdict for that sum. No objection was made to this proposition by counsel on either side, and the jury assessed the damages contingently at one farthing.

A rule nisi having been obtained for a new trial, on the ground of misdirection,

Cockburn and *Kinglake* shewed cause The plea shews a sufficient justification for the entry. In *Sheers v. Brooks* (a), it was held that bail above might justify the breaking and entering the house of a stranger (the outer door being open)

(a) 2 H. Bl. 120.

in which the principal resided, in order to seek for him, for the purpose of rendering him: and that a plea justifying such entry was good, without stating that the principal was in the house at the time. In this case, it appeared, that the party against whom the writ issued, had resided in the house six months before. The cases bearing on this subject will be found in the note to *Semayne's case* (a).

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Crowder and Butt, in support of the rule. In *Johnson v. Leigh* (b), it was expressly decided, that a sheriff cannot justify breaking the inner doors of a stranger's house, on suspicion that a defendant is there, for the purpose of arresting him on mesne process. The direction of the learned Judge having been at variance with that case, the plaintiff is entitled on that ground to a new trial. [*Pollock, C. B.*—You are at liberty to move to enter a verdict for the damages found by the jury; but having consented, at the trial, to a contingent assessment of damages, you are now precluded from insisting upon the misdirection.] Counsel could not with propriety have interposed whilst the learned Judge was summing up. [*Pollock, C. B.*—Neither party was obliged to assent to the course suggested by the Judge for the purpose of saving expense. Suppose the damages had been contingently assessed at 500*l.*, could the defendants object to the plaintiff moving to enter a verdict for that sum, on the ground that they had not given their consent? Either party might have refused his assent to the proposition of the Judge.] The arrangement was for the benefit of the defendants, and it was their duty to interfere.

POLLOCK, C. B.—This must be considered as an application to enter a verdict for the plaintiff, with one farthing damages. It appears, from the report of the learned Judge, that he directed the jury to find for the plaintiff on the

(a) *Smith's Leading Cases*, 44, 45.

(b) 6 *Taunt.* 246; See *S. C.* 1 *Marsh.* 565.

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pleas of not guilty and not possessed, and he thought the defendants entitled to a verdict on the special plea of justification; but he suggested that the jury should assess the damages contingently, in the event of his being mistaken in point of law. The damages were accordingly assessed at one farthing, and although I should not have been dissatisfied if the jury had found larger damages, yet as no objection was made to the course suggested by the learned Judge, both parties are bound by it. We think the rule ought to be absolute to enter a verdict for the plaintiff with one farthing damages. The facts are, that the sheriff went to the house of a stranger, to search for a debtor, and that he had good ground to suspect that she was there. But the case of *Johnson v. Leigh* (a) is an express authority that a sheriff may not break open the inner doors of a stranger's house upon suspicion that the defendant is there. Then it is contended, on the part of the plaintiff, that he is entitled to a new trial on the ground of misdirection. I cannot assent to that. The learned Judge directed the damages to be assessed contingently, with a view to prevent the expense of a new trial; a step, however, which he had no power to take, unless with the assent of both parties. Neither party objected; therefore both are bound by the arrangement. Both sides understood that it was for their mutual benefit, and each was satisfied that the jury intended to do justice. If under such circumstances, counsel were afterwards at liberty to repudiate the arrangement, great inconvenience would ensue. The rule will be absolute to enter a verdict for the plaintiff, with a farthing damages.

ALDERSON, B.—It is admitted that the whole of the plea was not proved, but if the part proved amounts to a defence, that is sufficient. The question then is, whether that part of the plea which was proved, constitutes a sufficient defence to the action? I think it does not. In substance it is merely this; that the defendants had reasonable ground to suspect that the party sought to be arrested was in

(a) 6 Taunt. 246; S. C. 1 Marsh. 565.

the plaintiff's house, when she was not there. But an officer who enters the house of a stranger to search for and arrest a debtor, can only be justified by the event. It is different where the officer enters the house of the defendant himself, for the purpose of arresting him or taking his goods; for in that case he is justified if he have reasonable ground for believing that the party or his goods are there. In this case, the debtor was not found in the plaintiff's house, and therefore the defendants were not justified in so entering. The next point is, whether the plaintiff is to have a new trial, on the ground of misdirection, or is to enter a verdict with one farthing damages? With respect to the damages, I am inclined to think that they are too small; but at the time of the arrangement, it was uncertain how much the jury would give. A proposal was made in the presence of counsel on both sides, that the jury should assess the damages contingently;—both parties heard the proposal, both availed themselves of it, and, therefore, both are bound by it for good or ill.

GURNEY, B., concurred.

Rule absolute to enter a verdict for Plaintiff.

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FIRMSTONE and Another v. WHEELEY and Another.

CASE. The declaration stated, that before and at the time of the committing of the grievances, &c., the defendants were owners of, and in possession of, a certain mine, to wit, a coal mine; and the plaintiffs were then also the owners of, and in possession of, a certain other coal mine; and the said coal mines of the plaintiffs and defendants

quantity of coal; that water had arisen in the defendants' mine, against which, but for the trespass of the plaintiffs, the coal would have been a sufficient barrier; that thereupon it became and was the duty of the defendants to prevent the water in their mine, from flowing into the plaintiffs' mine; yet the defendants neglected their said duty, whereby the water flowed into the plaintiffs' mine, and prevented them from working the same: *Held*, on general demurrer, a good count in case.

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respectively were then, and are, and always have been, next adjacent, and contiguous to, and abutting upon one another: that the defendants so being the owners of, and in possession of, the said coal mine, for a long time previously to the committing of the grievances, had, on a certain day and year before the committing of the said grievances, to wit, on, &c., trespassed upon the mine of the plaintiffs, and had then dug out and carried away from the mine of the plaintiffs, divers large quantities of the said mine, to wit, of coals: that after the committing by the defendants of the last mentioned trespasses, divers large quantities of water had arisen, accumulated, and flowed together, in and upon the mine of the defendants, and which said water would, and, from the relative position of the mines of the plaintiffs and defendants respectively, necessarily must (and as is hereinafter mentioned, did in fact,) flow down upon, flow into, flood, and inundate the mine of the plaintiffs, except and unless a good and sufficient barrier, dam, or other appropriate impediment, or means of confining the said large quantities of water, and preventing them from so flowing down upon, &c., the mine of the plaintiffs, existed, or had been, or were taken, provided, or made use of, in that behalf: that the defendants had, by their said trespasses, got, dug out, carried away, and disposed of, divers large quantities of the said mine of the plaintiffs, to wit, of the coals thereof, which but for the said trespasses would have been suffered to remain and form, constitute, continue, and be; and the plaintiffs say, that but for the trespasses last aforesaid, they the plaintiffs would have suffered and permitted the last mentioned quantities of the said mine to remain, and form, constitute, continue, and be, and the same would in fact have remained, and formed, constituted, continued, and been, a good and sufficient, and in every respect, an ample barrier and means for preventing the said large quantities of water so accumulated and flowed together, in and upon the mine of the defendants, from flowing down upon, flowing into, flooding, or inun-

dating, the mine of the plaintiffs: that the defendants having committed the said trespasses, and having then thereby destroyed, removed, and carried away, the said barrier, dam, and means then theretofore existing, for preventing the said large quantities of water so accumulated and flowed together, and from time to time, accumulating and flowing together, in and upon the mine of the defendants, from flowing down upon, flowing into, inundating, and flooding, the mine of the plaintiffs; and having by means of the aforesaid trespasses deprived the plaintiffs of the only barrier, dam, or means of preventing the said large quantities of water accumulated and flowed together in and upon the mine of the defendants, from flowing down upon, flowing into, accumulating and flooding the mine of the plaintiffs: [Averment of notice.] It then thereupon became and was the duty of the defendants to make such provision, and to take such means, and so to manage, confine, and dispose of the said water so accumulated and flowed together, in and upon the mine of them, the defendants, after the committing by them, the defendants, of the trespasses hereinbefore mentioned, and from time to time thereafter accumulating and flowing together, in and upon the mine of the defendants, (and which, but for the committing of the said trespasses, by the defendants as aforesaid, would, by the said large quantities of the said mine of the plaintiffs, to wit, of the coals thereof, which had been by the defendants, got, dug out, and carried away, and disposed of, as aforesaid, have been altogether prevented and impeded from flowing down upon, flowing into, flooding or inundating the mine of the plaintiffs,) that none of the water so accumulated and flowed together in and upon the mine of the defendants, after the committing by the defendants of the trespasses hereinbefore mentioned, or at any time thereafter to accumulate or flow together, from time to time, in and upon the mine of them the defendants, should flow down upon, flow into, flood or inundate the mine of the plaintiffs. Yet the plaintiffs say, that although after

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the committing by the defendants of the said trespasses, and after full knowledge and notice of the premises, had come to and been received by the defendants, divers and very large quantities of water, (which but for the committing of the last mentioned trespasses, would have been so impeded and prevented as is hereinbefore in that behalf mentioned,) flowed together and accumulated in and upon the mine of the defendants; and although the defendants might and could, and ought to have taken such means and made such provision, and so to have managed, confined, and disposed of the said last mentioned water, that the same might not flow down upon, flow into, flood or inundate the said mine of the plaintiffs; and although the defendants did, for a short period, and to a small extent, perform their duty in that behalf; nevertheless the plaintiffs say, that they the defendants have so failed and neglected to perform the said duty, and have so broken the same, that except as aforesaid, they have wholly failed and neglected to make any provision, or to take or provide any means whatever, or in any way whatever to manage, confine, or dispose of the said last mentioned water, so that the same might not, nor might nor should any part thereof flow down upon, flow into, and flood or inundate the said mine of the plaintiffs; that by means and through the defendants' said breach of duty and not otherwise, divers large quantities, to wit, fifty millions of gallons of the said water so accumulated, and from time to time accumulating, and flowing together in and upon the said mine of the defendants, since the committing by them of the said trespasses as aforesaid; and which but for the committing of the said trespasses by the defendants as aforesaid, would by the said large quantities of the said mine of the plaintiffs, to wit, of the coals thereof, so by the defendants got, dug out, and carried away and disposed of as aforesaid, (the same being so as aforesaid, the only barrier, dam, or means reasonably appropriate, and sufficient in that behalf,) have been altogether prevented and impeded from flowing down

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the committing by the defendants of the said trespasses, and after full knowledge and notice of the premises, had come to and been received by the defendants, divers and very large quantities of water, (which but for the committing of the last mentioned trespasses, would have been so impeded and prevented as is hereinbefore in that behalf mentioned,) flowed together and accumulated in and upon the mine of the defendants; and although the defendants might and could, and ought to have taken such means and made such provision, and so to have managed, confined, and disposed of the said last mentioned water, that the same might not flow down upon, flow into, flood or inundate the said mine of the plaintiffs; and although the defendants did, for a short period, and to a small extent, perform their duty in that behalf; nevertheless the plaintiffs say, that they the defendants have so failed and neglected to perform the said duty, and have so broken the same, that except as aforesaid, they have wholly failed and neglected to make any provision, or to take or provide any means whatever, or in any way whatever to manage, confine, or dispose of the said last mentioned water, so that the same might not, nor might nor should any part thereof flow down upon, flow into, and flood or inundate the said mine of the plaintiffs; that by means and through the defendants' said breach of duty and not otherwise, divers large quantities, to wit, fifty millions of gallons of the said water so accumulated, and from time to time accumulating, and flowing together in and upon the said mine of the defendants, since the committing by them of the said trespasses as aforesaid; and which but for the committing of the said trespasses by the defendants as aforesaid, would by the said large quantities of the said mine of the plaintiffs, to wit, of the coals thereof, so by the defendants got, dug out, and carried away and disposed of as aforesaid, (the same being so as aforesaid, the only barrier, dam, or means reasonably appropriate, and sufficient in that behalf,) have been altogether prevented and impeded from flowing down

upon, flowing into, flooding or inundating the said mine of the plaintiffs; on a certain day and year after the committing of the said trespasses, and on divers other days, &c., wrongfully and injuriously flowed down upon, flowed into, inundated and flooded the mine of the plaintiffs, and then wholly prevented the plaintiffs from working the said mine, &c.

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General demurrer and joinder.

Alexander, in support of the demurrer. The declaration, both in form and in substance, is in case; but the grievance complained of is properly the subject of an action of trespass. In an action for the former trespass, the plaintiffs might have recovered full satisfaction for the damage now complained of. If it be said that this is an informal count in trespass, the declaration is, nevertheless, bad; for it relies upon an act of non-feazance; and for that no action will lie, unless there be a breach of duty. In this case, there was no obligation on the defendants to protect the plaintiffs; *Peyton v. The Mayor &c. of London* (a), *Chadwick v. Trower* (b). If the present grievance be treated as a continuing trespass, the proper form of action is trespass, *Holmes v. Wilson* (c). A judgment recovered in the present case would be no bar to an action in respect of the original trespass. It is difficult to see how the defendants could plead to this declaration, they could not traverse the duty, nor could they deny the original trespass. *Ingram v. Lawson* (d), and *Hodsoll v. Stallebrass* (e), are authorities to shew, that the plaintiffs might have recovered prospective damages in an action for the original trespass. The defendants had no right to enter the plaintiffs' mine in order to prevent the water from overflowing, *Jones v. Williams* (f).

(a) 9 B. & C. 725; See S. C. 4 M. & R. 625.

(b) 6 Bing. N. C. 1; See S. C. 3 Scott, 1.

(c) 10 A. & E. 503.

(d) 9 C. & P. 326; See S. C. 2 M. & Rob. 253.

(e) 11 A. & E. 301; See S. C. 3 P. & D. 200; 8 Dowl. 482.

(f) 11 M. & W. 176.

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[*Pollock*, C. B.—I do not see why the defendants cannot traverse the foundation of the duty. It is similar to the case of a carrier or a coachmaster; if the duty is alleged to be the result of the relation in which the parties stand to each other, the party charged must have a right to traverse it.] In that case the form of action should have been trespass. [*Pollock*, C. B.—Suppose a person digs so near a highway, as to render it dangerous, unless fenced by day and lighted by night; that might be a trespass to the soil, for which the lord of the manor, or owner of the land, could maintain trespass; but there being also a duty to guard the public, a person injured would have a right to sue in case.] Such right would arise in respect of the violation of a public duty; but in this case, there is no obligation on the defendants to remove the water from their own mine. In *Walton v. Waterhouse* (a), it is said, “there is a distinction between a duty created by law, and one created by the party. For when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him: as in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused; so in escape, if a prison be destroyed by tempest or enemies the gaoler is excused, 33 Hen. 6, c. 1; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.” [*Alderson*, B.—Here is a quantity of water in the defendants’ mine, which it is his duty to prevent from flowing to the plaintiffs’ mine, and the reason alleged is, that the defendants have removed the bar. The defendants ought, therefore, to take reasonable precautions to keep out the water.] The injury is the result of a continuing trespass.

Peacock, contra. First, the declaration shews a duty

(a) 2 Wms. Saund. p. 422, n. 2.

cast on the defendants by reason of their wrongful act. It appears, that the barrier would have been sufficient to protect the plaintiffs, and that the defendants committed a trespass in removing it. The case may be tested by reference to the law respecting fences. When two persons are owners of adjoining lands, neither is bound to fence his own land, but each is bound to take care that his cattle do not wander from his land, and trespass on the land of the other, *Boyle v. Tamlyn* (a). But suppose each of the adjoining lands had fences, and the one party wrongfully cuts down the other's fence, an obligation would be cast on the party having so trespassed, not to cut his own fence, or to keep his cattle from straying; and if the other's cattle strayed, the former could not have impounded them, by reason of his having committed a wrongful act in destroying the fence. Secondly, the plaintiffs may maintain case for the consequential damage arising from the trespass alleged in the declaration. In *Scott v. Shepherd* (b), *Blackstone, J.*, says, "every action of trespass with a 'per quod,' includes an action on the case. I may bring trespass for the immediate injury, and subjoin a 'per quod' for the consequential damages; or may bring case for the consequential damages, and pass over the immediate injury." If trespass had been brought for the injury now complained of, an action of trespass for the original damage might have been pleaded in answer. In *Sutton v. Clarke* (c), *Gibbs, C. J.*, in declaring judgment, says, "this case is perfectly unlike that of an individual who makes an improvement on his own land, from which an injury eventually accrues to another; such person must answer for the injury, because he was acting for his own benefit." A fortiori, if the damage results from injury to his neighbour's land. A former Highway Act, directed, that all actions against persons for anything done or acted in pursuance thereof, should be

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(a) 6 B. & C. 329; See S. C. 9 Wils. 403.
D. & R. 430.

(c) 1 Marsh. 440; See S. C. 6

(b) 2 W. Bl. 897; See S. C. 3 Taunt. 29.

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commenced within three calendar months after the fact committed, yet where surveyors of highways undermined a wall, which did not fall until three months afterwards, it was held, that they were liable to an action on the case, for the consequential injury, within three months after the falling of the wall, *Roberts v. Read* (a). Where there is an injury to the reversion, or a consequential damage, case may be maintained, though the original act was a trespass. *Harris v. Ryding* (b), *Raine v. Alderson* (c), *Wells v. Ody* (d), *Leame v. Bray* (e), *Blyth v. Topham* (f). But assuming that this is not a good count in case, it is, at all events, an informal count in trespass. And as the defendants have not demurred specially, any cause of action in trespass will support the count, *Hudson v. Nicholson* (g).

POLLOCK, C. B.—The substance of the complaint is, that the defendants have removed the only barrier between the mines; and that, therefore, it became their duty so to deal with the water accumulating in their mine, as to prevent it flowing into the mine of the plaintiffs. There may, perhaps, be a difference as regards the law between the barrier of a mine, and a fence above ground. If a wall is knocked down, the owner may maintain an action for the trespass; but he cannot, by omitting to rebuild it, hold the defendant always responsible for any consequential damage. But here, the plaintiffs say, that the removal of the barrier is irreparable, and therefore, the duty alleged in this declaration may well arise. The defendants may amend by withdrawing their demurrer on the usual terms, unless the plaintiffs think fit to amend the declaration.

ALDERSON, B., GURNEY, B., and ROLFE, B., concurred.

Judgment accordingly.

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| (a) 16 East, 215. | 5 Dowl. 95. |
| (b) 5 M. & W. 60. | (e) 3 East, 593. |
| (c) 4 Bing. N. C. 702; See S. | (f) Cro. Jac. 158. |
| C. 6 Scott, 691. | (g) 5 M. & W. 437. |
| (d) 1 M. & W. 452; See S. C. | |

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WINTER v. DIBDIN.

A RULE had been obtained, calling on the plaintiff to shew cause why the defendant, who had been arrested on a writ of *capias ad satisfaciendum*, should not be discharged out of the custody of the sheriff of Middlesex, and why the plaintiff should not pay the costs of the arrest, and of that application. The affidavits in support of the rule, stated, that the defendant was one of her Majesty's chaplains in ordinary, with fee; that he had officiated as such, and was liable to be called on to do such duty, whenever it might please her Majesty. A copy of a certificate of his appointment was produced, the original appointment having been mislaid.

A chaplain in ordinary of the Queen is privileged from arrest on final process.

Jervis shewed cause. The defendant ought to shew that he was in personal attendance on the Queen. This case is distinguishable from *Byrn v. Dibdin* (a), for there the arrest was on mesne process. Here, the defendant being in custody on final process, the Court will not interfere on motion, but will leave him to his remedy by writ of privilege. Supposing his services had been dispensed with by the Lord Chamberlain, he would be liable to arrest (b). The affidavit in support of the application, should, therefore, have stated that his services had not been dispensed with.

M. D. Hill was not called upon to support the rule.

PER CURIAM.—The defendant is clearly entitled to be discharged. The rule will, therefore, be absolute, but without costs.

Rule absolute.

(a) 1 C., M. & R. 821; See S. (b) Chit. Arch. 110, 6th ed. C. 3 Dowl. 448.

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WILLIAMS v. JARMAN.

Where the defendant demurs to one count of a declaration, and the plaintiff demurs to a plea to another count; the latter is entitled to begin, on the hearing of the argument.

THE declaration in this case contained a special count in assumpsit, and also the indebitatus counts. The defendant demurred specially to the first count, and pleaded to the latter counts. The plaintiff joined in demurrer, and demurred specially to the plea. The defendant having joined in the latter demurrer,

Willes, for the plaintiff, claimed the right to begin, and submitted, that the same rule ought to hold as in the case of an issue, in fact, on the plaintiff. He said, it had been so decided in the Court of Common Pleas in an unreported case.

Best, contra, contended, that the rule which entitled the plaintiff to begin, when any issue, in fact, was on him, arose from the necessity of proving damage, the onus of which lay on the plaintiff.

PER CURIAM.—We think by analogy to the proceedings at Nisi Prius, that the plaintiff is entitled to begin.

LOWETH v. SMITH and Another.

Trespass for breaking and entering the plaintiff's dwelling-house, and staying and continuing

therein, for a long time, to wit, for the space of four days.

THE declaration stated, that the defendants theretofore, to wit, on the 20th of June, A. D., 1843, with force and arms, &c., broke and entered a certain dwelling-house and brick yard of the plaintiff thereunto belonging, situate, &c.,

Held, on special demurrer, that the replication was not double.

and then made a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance therein for a long time, to wit, for the space of four days then next following : and then forced and broke open, broke to pieces and damaged, divers, to wit, six doors of the plaintiff, of and belonging to the said dwelling, with the appurtenances, and broke to pieces, damaged and spoiled, divers, to wit, six locks, &c., of and belonging to the said doors respectively, and wherewith the same were fastened, and of great value, to wit, &c. : and also during the time aforesaid, to wit, on the said 20th day of June, in the year aforesaid, with force and arms, &c., seized and took divers goods and chattels, to wit, &c., (enumerating them), of the plaintiff, there found and being in the said dwelling-house and brick yard, with the appurtenances, of great value, to wit, &c., and carried away the same, and converted and disposed thereof to his own use. By means of all which said several premises, &c.

Plea. As to breaking and entering the said dwelling-house and brick yard, and staying and continuing therein, as in the declaration mentioned, the defendants say, that before the said time when, &c., to wit, on, &c., the plaintiff, for and in consideration of a large sum of money, to him then paid by the defendant, John Smith, bargained and sold to the said John Smith, certain goods, chattels, and effects of the plaintiff, then being in and upon the said dwelling-house and brick yard, and then authorized and empowered the said John Smith, with proper and reasonable assistance, in that behalf, to enter in and upon the dwelling-house and brick yard, to take possession of the said goods, chattels, and effects, so bargained and sold to the said John Smith, and to carry away, convert, and dispose of the same, to the use of the said John Smith ; that afterwards, to wit, at the said time when, &c., the said goods, chattels, and effects, so bargained and sold to the said John Smith, as aforesaid, then being in and upon the said dwelling-house and brick yard, the said John Smith, in his own right, and the said

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other defendant, Thomas Worth, as his servant, and by his command in that behalf, in pursuance and exercise of the power and authority so given and granted by the plaintiff as aforesaid, entered into and upon the said dwelling-house and brick yard for the purpose of taking possession of the said goods, chattels, and effects, and of carrying away, converting, and disposing of the same, to the use of the said John Smith, and did then and there take possession of the said goods, chattels, and effects, and carry away, convert, and dispose of the same, to the use of the said John Smith, as it was lawful for them to do for the cause aforesaid, quæ sunt eadem, &c. Verification.

Replication. That the plaintiff did not authorize and empower the said John Smith, with proper and reasonable assistance in that behalf, to enter in and upon the said dwelling-house and brick yard, to take possession of the said goods, chattels, and effects, modo et formâ, &c.

New assignment. And the plaintiff further saith, that he issued his writ, and declared thereupon not only for the breaking and entering the said dwelling-house and brick yard, and staying and continuing therein, in the introductory part of the said plea mentioned, and in the said plea attempted to be justified, but also for that the defendants, with force and arms, &c., and without authority, and against the leave and license of the plaintiff, to wit, at the said times in the said declaration in this behalf mentioned, stayed and continued in and upon the said dwelling-house and brick yard, making such noise and disturbance, as in the said declaration mentioned, for a long time, to wit, the space of three days next after the said day in the declaration mentioned, for other and different purposes than those in the said plea mentioned, and also for a much longer time, to wit, the said spaces of three days longer than was necessary for the purpose of taking possession of the said goods, chattels, and effects, in the said plea mentioned, which said trespasses above hereby assigned, are other and different trespasses than the

trespasses in the introductory part of the said plea mentioned, and therein attempted to be justified, wherefore, as the defendants have not answered the trespasses, also newly assigned, &c.

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Special demurrer to replication and new assignment, assigning for causes, that the plaintiff, in and by his declaration, hath complained of one breaking and entering the said dwelling-house and brick yard, and staying and continuing therein, as in the declaration mentioned, and not of divers distinct trespasses to the said dwelling-house and brick yard on divers days or occasions, and the defendants have, in and by their said plea, justified the said supposed trespasses so complained of, in manner and form as in that plea alleged; yet the plaintiff hath not only replied to the said plea, by traversing a certain allegation therein contained, to wit, that he authorized and empowered the said John Smith, with proper and reasonable assistance in that behalf, to enter in and upon the said dwelling-house and brick yard, to take possession of the said goods, chattels, and effects; but the plaintiff hath also newly assigned to the said plea, that he issued his writ and declared thereupon, not only for the breaking and entering the said dwelling-house and brick yard, and staying and continuing therein as in the introductory part of the said plea mentioned, and in the said plea attempted to be justified, (which is the only trespass to the said dwelling-house and brick yard alleged in the declaration,) but also for that the defendants, with force and arms, and without the authority, and against the leave and license of the plaintiff, committed other and different trespasses in the said dwelling-house and brick yard, as in the said new assignment particularly mentioned. And for that the said replication and new assignment are double and multifarious in respect of the matters aforesaid, and afford two distinct answers to the said plea, &c.

Cole, in support of the demurrer. The replication is bad

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for duplicity, inasmuch as it both traverses the plea, and also new assigns. The declaration alleges but one trespass, with a continuance, and the plea affords a complete answer to the trespass complained of; consequently, the plaintiff has no right to traverse that answer, and also new assign. The declaration charges a breaking and entering, and a continuing on the premises for a long time; but that averment would be justified by proof of mere momentary continuance. In *Taylor v. Smith* (a), a single act only of trespass being laid, and that act being covered by the plea of justification, the Court held, that there could be no new assignment. In *Cheasley v. Barnes* (b), the declaration complained of a breaking and entering, and seizing, and afterwards on divers other days, taking away manure: the plea justified a breaking and entering under a judgment recorded; and it was held, that the plaintiff could not in his replication take issue on the fact of such justification, and also new assign either the same or different matters. In a note to that case, a similar case is mentioned, (*Franks v. Morris*) in which the declaration complained of an assault and battery, and throwing on the ground, and breaking the plaintiff's leg. The plea was son assault demesne; and the plaintiff replied as to the trespasses attempted to be justified, de injuriâ, and new assigned that they were committed with greater violence than was necessary. That case was admitted to involve the same question, and leave was given to amend. *Gisborne v. Wyatt* (c), and *Thomas v. Marsh* (d), are authorities to the same effect. [Parke, B.—You may traverse a right of way, and also new assign, extra viam; time is quite as divisible as space.] In the case of false imprisonment, the defendant cannot justify the imprisonment, and also new assign. [Parke, B.—Not, if one single act of trespass is alleged, the whole of which the plea justifies.] Here there is a breaking, and entering, and continuing on the premises for a long time, to wit, four

(a) 7 Taunt. 156.
 (b) 10 East, 73.

(c) 3 Dowl. 505.
 (d) 5 C. & P. 596.

days. [*Parke, B.*—That might be for several days, and every continuation is a fresh trespass.] The plea justifies the whole breaking, and entering, and continuing for four days. [*Parke, B.*—The plaintiff by his replication, says, “I deny that you had any such authority, and if you had, you have exceeded it.” He therefore justifies a portion, and newly assigns excess. A trespass is just as severable when time is its essential feature, as when space is: had you not better amend? *Alderson, B.*—There is no departure here. The replication does not set up a second breaking and entering.]

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Hayes appeared in support of the replication.

Leave to amend.

SMALLCOMBE v. OLIVIER.

CASE against the sheriff of Wiltshire for not levying, and falsely returning nulla bona to a writ of testatum fieri facias.

Pleas, not guilty, and nulla bona.

At the trial before Lord *Abinger, C. B.*, at the London Sittings after Michaelmas Term, 1843, it appeared that the plaintiff had lodged with the sheriff a writ of testatum fieri facias, to be executed on the goods of a debtor. Before the writ issued, a fiat in bankruptcy was sued out against the debtor, under which he was declared bankrupt, and assignees were regularly appointed. The sheriff, therefore, returned nulla bona. Before that return was made, the Court of Review had ordered that the fiat should be annulled, if the Lord Chancellor should think fit so to direct; and after the return, the Lord Chancellor had made

A writ of *fi. fa.* having been lodged with the sheriff after a debtor had been declared bankrupt and assignees appointed, the sheriff returned “nulla bona.” Before the return was made, the Court of Review had ordered that the fiat be annulled, if the Lord Chancellor should think fit; and after the return, the Lord Chan-

cellor made an order accordingly: *Held*, that the return was not false; since the annulling of the fiat had not a retrospective effect; and that even if it had, the sheriff being a public officer, and having made the only return which he could at the time have made, ought to be protected.

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an order for annulling the fiat. The debtor had, at the time he was declared bankrupt, and before the appointment of assignees, sufficient goods upon which the sheriff might have levied the debt. The jury found for the plaintiff, leave being reserved for the defendant to move to enter a verdict for him, if the Court should be of opinion that the facts proved constituted a defence.

A rule nisi having been obtained accordingly,

The Solicitor General, J. Russell, and W. J. Alexander,
 shewed cause.

Erle and Montague Smith were heard in support of the rule.

The arguments fully appear in the judgment. The following statutes and authorities were referred to, 6 Geo. 4, c. 16, ss. 78, 87, 92, 93, 94; 1 & 2 Wm. 4, c. 56, ss. 2, 19, *Eden's Bankrupt Law*, p. 432, *Deacon's Bankrupt Law*, p. 832, 1 *Mont. and Ayr. Bankrupt Law*, p. 518, 525, *Ex parte Edwards* (a), *Ex parte Jackson* (b), *Ex parte Bowler* (c), *Ex parte Lavender* (d), *Ex parte Smith* (e), *Bartlett v. Tuchin* (f), *Gould v. Shoyer* (g), *Balme v. Hutton* (h), *Brydges v. Walford* (i), *Godson v. Sanctuary* (k).

Cur. adv. vult.

The judgment of the Court was delivered by

POLLOCK, C. B.—(After stating the facts, &c.) A rule

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| (a) 10 Ves. 104. | (g) 6 Bing. 738; See S. C. 4 |
| (b) 8 Ves. 533. | M. & P. 635. |
| (c) Buck. 258. | (h) 2 Cr. & J. 19. |
| (d) 18 Ves. 18. | (i) 6 M. & S. 42. |
| (e) Buck, 262, n. | (k) 4 B. & Ad. 255; See S. C. |
| (f) 6 Taunt. 259; See S. C. 1 | 1 N. & M. 52. |
| Marsh. 583. | |

nisi having been granted in this case, pursuant to the leave reserved at the trial, cause was shewn in last Term, and the Court took time to consider its judgment. On the part of the plaintiff, it was contended, that the fiat having been annulled, the rights of the parties must be considered as if no such fiat had ever issued, and that consequently the goods must be treated as having all along remained the property of the debtor; and so, that the return of the sheriff was false. On the part of the defendant, the sheriff, it was argued, that the order of the Lord Chancellor annulling the fiat, had no retrospective effect; that at the time the sheriff made the return, the goods were not the goods of the debtor, but of his assignees, and, consequently, the sheriff would be a trespasser if he had taken them; and so, that his return was strictly true. The statutes now in force relating to the transfer of the bankrupt's personal estate from the bankrupt to his assignees, are the 6 Geo. 4, c. 16, s. 63, and the 1 & 2 Wm. 4, c. 56, s. 25. By the first of these statutes, it is enacted, that the commissioners shall assign to the assignees for the benefit of creditors, the present and future personal estate of the bankrupt; and by the subsequent statute it is enacted, that when any person shall be adjudged a bankrupt, all his personal estate, which by the laws then in force might be assigned by the commissioners, shall become absolutely vested in and transferred to the assignees without any deed of assignment. In the present case, the debtor against whom the writ of fieri facias had issued, had been originally adjudged a bankrupt before the fieri facias issued, and, therefore, unquestionably all his goods had, according to the express provision of the latter statute, vested in his assignees, and ceased to be his property: so that that return of the sheriff was true, unless the property in the goods was so affected by the subsequent order of the Court of Review and of the Lord Chancellor, as to make false the return, which but for those orders would have been true.

In the first place, we think, it is quite clear, that the

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question turns on the effect to be given to the order of the Lord Chancellor, and not to that of the Court of Review. Until the Lord Chancellor had made his order, the order of the Court of Review had no operation. It was to be treated rather as a recommendation to the Lord Chancellor, than an act having, or intended to have, force by itself. By the 19th section of the 1 & 2 Wm. 4, c. 56, being the statute establishing the Court of Bankruptcy, and substituting fiats, for commissions under the great seal, it is enacted, that an order of the Lord Chancellor, annulling a fiat, shall have the force and effect of a supersedeas of the commission, according to the then existing law in practice in bankruptcy; and the point now to be decided, therefore, ultimately resolves itself into this, what under the old law would have been the effect of a supersedeas on a return of nulla bona made during the subsistence of the commission, and after the assignment by the commissioners of the goods of the bankrupt to his assignees? It may be observed, that the object of all the statutes relating to bankruptcy, which have been from time to time in force, has been to apply all or a competent part of the bankrupt's effects, real and personal, in a full or rateable satisfaction to the demands of his creditors, either by sale and rateable distribution of the proceeds of the sale, or else by making over the property itself to the creditors.

Now, it is obvious, that in order to effect such a purpose, it is essential that those who are to administer the property, should be able to make an absolute indefeasible title to it, so that the purchaser or others taking it, may be well assured that they will hold the same as securely, as if purchased from the bankrupt himself. Unless, therefore, there is something very clear in the statutes themselves, or in the construction which has been judicially put upon them, leading to a different conclusion, the Court would be very unwilling to believe there could be any power in the Lord Chancellor, after the property of the bankrupt has been transferred, which can alter the effect of that transfer. It is said, how-

ever, by the counsel for the plaintiff, that before the act 1 & 2 Wm. 4, c. 56, which established the Court of Bankruptcy, the writ of supersedeas had such an effect, that whatever might have been done under the commission, the writ of supersedeas annulled everything, and put the bankrupt's estate and the debtor precisely in the same situation, as if no commission had been issued. This is certainly a very startling proposition. While the commission was in force, (assuming, of course, there were all the legal requisites to support it), the assignee might bring an action against a bankrupt's debtor, and compel him to pay them the debt which he owed to the bankrupt; and the debtor could have no defence to such an action. Now the effect of the plaintiff's argument is, that if the commission should be afterwards superseded, the debtor must pay his debt over again to the bankrupt.

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Again, if the assignees contract to sell, and a stranger contracts to purchase, the bankrupt's real estate, a Court of equity will, on a bill filed by the assignees, compel the purchaser to perform the contract, pay his purchase-money, and accept the conveyance. And the plaintiff here contends, that by an act afterwards, to which the purchaser was no party, over which he had no control, and after any lapse of time, unless protected by the Statute of Limitations, he will be wholly deprived of his property.

But there are other still more startling consequences arising from this doctrine. If the bankrupt has not duly surrendered at the time of the bankruptcy, he is guilty of felony, now punishable by transportation for life, and which, until lately, was a capital offence; and yet, what is contended for is, that before the conviction, it is in the power of the Lord Chancellor, to convert that capital felony into a perfectly innocent act. Again, when the fiat is in force, if the bankrupt has omitted to surrender, it may become necessary for the peace officer to use force in order to his apprehension, and under such circumstances even to take away his life, if he cannot otherwise be

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taken ; can it be possible that the Lord Chancellor, by superseding the commission, or now by annulling the fiat, can make a man a criminal, or even a murderer, who, at the time of doing the act, did no more than his duty ? These are, no doubt, extreme cases, but they serve to test the correctness of the proposition contended for, which undoubtedly leads to all the consequences we have pointed out, and many others which are equally absurd.

But what reason is there for attributing any such consequences to a supersedeas ? We have been unable to discover in the Bankrupt Act, or any other statute in force, any enactment which would take this case out of the principles of the common law ; and in answer to a question which we put to the Bar during the argument, we were told that no such enactment exists ; the legal effect, therefore, of a supersedeas of a commission in bankruptcy, must be ascertained by analogy to the effect of similar writs in other cases.

Now, in *Fitzherbert*, p. 236, we find many instances of writs of supersedeas, and there are many more in the *Natura Brevium* ; but in none can we discover any effect as attributable to the writ, except that of ordering the party to whom it is directed, to cease from further proceedings in the matter to which it relates. In order that general effect may be given to it, it is confined to that which remains to be done when the writ issues. Thus, in a writ of supersedeas to the sheriff, where the party, the defendant, who has been taken in execution, has appeared and put in, or is ready to put in bail, the writ commands the sheriff to supersede the exigent, according to one form ; or according to another form, to supersede the further proceeding in the exigent, which are equivalent. So where a party having been called on by the justices to find sureties for the peace to put in bail in Chancery, he may have a supersedeas to the justices, commanding them to supersede the arrest ; if he has already been arrested, then a writ of supersedeas to the sheriff. It is needless to multiply examples. On

referring to *Fitzherbert's Index* to the *Natura Brevium*, a great number of cases will be found in which writs of supersedeas issue, in none of which is there any suggestion of retrospective effect. The same observation applies to supersedeas of commissions of the peace, which certainly have no effect as to past acts before the supersedeas.

Such then being the nature and the effects of supersedeas in other cases, what is there to lead to the conclusion that any greater effect is to be given to a supersedeas of a commission of bankruptcy? We can discover none. The language of a supersedeas of a commission of bankruptcy will be very nearly the same as that of a supersedeas of any other matter, as it commands the commissioners to stay and surcease all further proceedings, and to supersede the same accordingly; the latter words having, as it appears in the language of several writs in *Fitzherbert*, the same meaning as superseding or abstaining from further proceedings; and the absurdities which we have already alluded to, as resulting from giving any retrospective effect to supersedeas of commissions of bankruptcy are even more glaring than would be the case in some instances.

There are, moreover, other reasons which all point to the same conclusion. The administration of the bankrupt's estate, by means of the commission under the great seal, dates from the 13 Eliz. c. 7. By that statute, the Lord Chancellor is empowered to appoint by commission of the great seal, discreet persons, who should by virtue of their commission have full power to make such order, as well with the body, as with the land and goods of the bankrupt, as they may think fit, and make sale of the land and goods for the satisfaction of creditors; and under this statute the bankrupt's estate was administered up to the 5 Geo. 2, c. 30, which statute first introduced the appointment of assignees, to whom the commissioners were to assign the property, and who were then to administer it in the same way, as before that time it had been by the commissioners themselves.

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This continues down to 1 & 2 Wm. 4, c. 56, when fiats were substituted for commissions. Considering what effect is to be given to the supersedeas of the commission, which took its force from the 13 Eliz. c. 7, it may be right to look at the law as it stood before that time on the earlier statute 34 & 35 Hen. 8, c. 4. By that, which was, as we believe, the first statute on the subject, the power was given to the Lord Chancellor with certain other high officers to administer bankrupts' estates, not by means of the commissioners, but at their own discretion. All sales and other acts effected and done by them, were to have the same validity as if effected and done by the bankrupt himself. It is quite clear that there was no power in the Lord Chancellor before the 13 Eliz., by writ of supersedeas or otherwise, to make, to undo, or to effect any thing which he, or the other great officers named in the statute of Hen. 8, had done in pursuance of the powers given to them by that act; and it is hardly reasonable to suppose that it could be intended by the introduction of a commission, under the statute of Eliz. to give to the Lord Chancellor a power, which did not exist before, of defeating by subsequent supersedeas all which might be done by the commissioners. The object of the statute of Eliz. evidently was to carry out the enactment of the previous statute in a more efficacious manner; whereas the argument of the plaintiff would go to shew that the powers conferred by the first statute were more stringent and unassailable than those afterwards introduced. This consideration, therefore, appears to us to suggest another reason why the supersedeas cannot have any retrospective effect. It may be observed, that whenever a writ of supersedeas has issued, a writ of procedendo may also issue afterwards; the effect of which is to do away with the writ of supersedeas. It can hardly be supposed that the Legislature meant to give to the Lord Chancellor a power to issue writs, from time to time, which would have the effect of vesting the property in persons, and then divesting it again, and also making

acts, which were criminal when committed, become innocent; and, on the other hand, those which were perfectly innocent become criminal, and even in some cases capital felonies; and so altering from time to time, the character of such act, and the consequent condition of the parties, as the one or the other of the writs should be from time to time in force. It is no answer to say the Lord Chancellor could take care, in the exercise of his discretion, never to issue a supersedeas or procedendo, if such consequences would follow; and no doubt he could never intend to do so in the present case. If the law be, as contended for by the plaintiff, how impossible is it to foresee and guard against, the evil that may result to third persons in the exercise of a power which is to have the effect of altering the character of the act done.

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On all these grounds, it appears to us clear in principle, that the only effect of a writ of supersedeas is to deprive the commissioners of any further authority to proceed upon the commission; that it has no effect on the acts done before the supersedeas issues; and then, applying ourselves to the present case, the sheriff's return was strictly true, and he is entitled to a verdict. But we must not endeavour to conceal from ourselves, in coming to this decision, that we are acting in opposition, not indeed to much of judicial decision, but certainly to dicta of Judges of the very highest authority, repeated from time to time, under circumstances which leave no fair reason to doubt, that they entertained most confidently, an opinion directly opposed to that which we have formed.

In *Ex parte Leaverland* (a), Lord Hardwicke refused to supersede a commission, because, he said, that would entirely defeat the certificate. The question of certificate, however, rests on different grounds from that of distribution of the bankrupt's property. It may be that the continuance of the fiat is essential to the validity of the security; but if there be no fiat in force, the bankrupt can have no benefit from his certificate. We do not, therefore,

(a) 1 Atk. 145.

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attach much weight to that case; but in another in the same volume, p. 222, *Ex parte Wood*, similar language was used before the same eminent Judge, and as no doubt is expressed by Lord *Hardwicke*, he must have considered that it was so. We have not been able to discover any dicta on this subject from the time of Lord *Hardwicke* to that of Lord *Eldon*; but certainly the last-named very learned and eminent Judge has, on frequent occasions, gone the full length of stating that the effect of superseding a commission, was to put all parties in the same position as if no commission had issued; in *Ex parte Jackson (a)*, *Ex parte Edwards (b)*, and *Ex parte Smith (c)*; and there are many other cases in which similar language fell from him. It is, however, not unworthy of observation, that the last case, *Ex parte Smith*, is the only one in which that doctrine was acted on as adversely to the party contending. In that case, a purchaser, acting under a second commission, objected to the title of the assignees, by reason of a bargain and sale which had been made under the first, which had been superseded. Lord *Eldon* decided that the objection was untenable, inasmuch as the title under the first was defeated by the supersedeas. This, it must be admitted, was a direct decision on the point; not a decision of the same weight which it would have been if pronounced in an adverse suit, capable of being carried to the House of Lords by appeal; but still a proceeding entitled to great attention, as shewing the confidence of Lord *Eldon* in the soundness of the opinion he had formed on the subject. All the other cases are either mere dicta, or are cases in which the only decision was where Lord *Eldon* refused a supersedeas, lest by so doing he might prejudice the rights of others. To these latter cases we are hardly disposed to give much weight: the doubt and uncertainty might well justify a Judge, less cautious than Lord *Eldon*, in refusing to do an act which was one solely of discretion, and by which the interests of third persons might be put in jeopardy. The same observation certainly does not apply

(a) 8 Ves. 533.

(b) 10 Id. 104

(c) In a note to *Ex parte Bowler*, Buck. 262.

to *Ex parte Smith*; and we feel that, in coming to the decision at which we have arrived, we are bound to say we do not think that that case was rightly decided.

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We have thought it right, in a question of so much importance, in which our decision is opposed to so many dicta of Lord *Eldon*, to give the reasons which have led us to come to this conclusion, which will entitle the defendant in this case to a verdict.

It might probably be successfully contended, that the sheriff would be entitled to the verdict on other grounds. At the time he made his return, the goods were the property of the assignees, and not of the bankrupt. Afterwards the fiat issued. Even if we admit the annulling of the fiat was to restore all the property to the parties, as if no fiat had issued; yet it may be, that this must be subject to an exception in favour of a public officer like the sheriff, who acts on the property as he finds it, and who being bound to make a return, makes the only return, in his power to make at the time, which would be true. Our decision, therefore, may be supported on this narrow ground; but we feel bound to say, that the reasons which have led us to differ from Lord *Eldon* appear to us so satisfactory, that should we be required to do so, we are prepared to act on those reasons alone. The rule, therefore, will be made absolute.

Rule absolute.

GILBERT v. HALES.

THIS was a rule to shew cause why the five last counts of the declaration in this cause should not be struck out, on the ground that they were inserted in violation of the

A declaration contained twenty-five counts. The first fifteen were on bills of exchange drawn at Paris.

The next five, which related to the same bills, were special counts founded on the law of France; and the last five were on a special agreement to pay the bills in consideration of the plaintiff procuring their discount. Application having been made to strike out the last set of counts: *Held*, that they were not in apparent violation of the Reg. Gen., H. T., 4 Wm. 4, r. 5.

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Reg. Gen., H. T., 4 Wm. 4, r. 5, which provides, that "several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each." The defendant was sued as administratrix of one Edward Hales, deceased, and the declaration contained twenty-five counts. In the first fifteen, the plaintiff declared as indorsee of fifteen bills of exchange, drawn at Paris, on Hales, by one Marie de Moulincour. The next five, which related to the same bills, were special counts, founded on the law of France. The last five, which were those objected to, stated, that in consideration that the plaintiff, for certain reasonable reward, to be paid by Hales to the plaintiff, would negotiate and procure to be discounted, and would sell for Hales, several bills of exchange drawn by Marie de Moulincour on, and accepted by Hales, and would then guarantee the due payment of the same, and would pay over to Hales the proceeds thereof; Hales promised the plaintiff to pay the several bills, according to the tenor and effect thereof. The counts then averred that the plaintiff relying on the promise of Hales, negotiated the bills with the firm of Rothschild, bankers, and guaranteed the due payment thereof, and paid over the proceeds to the said Hales, and a breach was assigned in the terms of the promise. The bill of particulars stated, that the plaintiff sued as holder, and brought the action to recover damages in respect of the bills of exchange mentioned in the declaration.

Hoggins shewed cause. The three sets of counts shew upon the face of them a distinct subject matter of complaint. In the first, the plaintiff declares in the ordinary form as indorsee of the bills. In the second, he relies upon the foreign law. And in the last, he sues as a broker, founding his claim on a special promise, independent of the *lex mercatoria*.

Hayward, in support of the rule. The last set of counts

are unnecessary. The true test is to consider, whether the plaintiff could recover under the last set of counts, any damage to which he would not be entitled under the other counts. The bill of particulars states, that the plaintiff sues as holder, and to recover damages in respect of the bills of exchange mentioned in the declaration.

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POLLOCK, C. B.—The rule must be discharged. I do not think that the true criterion in these cases is that suggested by the defendant's counsel. In the example given in the rule of Court, freight on a charter party is allowed to be joined with a count for freight *pro ratâ itineris*; and such two counts might fairly be joined with a third, on a special agreement to pay for the goods carried. Each of those counts would require different pleadings, and different evidence to support it. So, in the present case, the three sets of counts are founded on separate and distinct rights. The first, on the *lex mercatoria*; the second, on the law of France; and the third, on a special agreement. As to the bill of particulars, it may perhaps bind the plaintiff at the trial; but it has nothing to do with the present question.

ALDERSON, B.—The question is, whether the five last counts are inserted in apparent violation of the rule of Court, as being substantially for the same cause of action as the other counts? The rule says, "that several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each;" and explains, that "counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstance only, are not to be allowed." The rule then puts several examples, amongst which is this, that "a count for freight upon a charter party, and for freight *pro ratâ itineris*, are to be allowed," because the one is on the express contract between the parties, the other on the contract supplied by law. Apply that to the present case.

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we find one set of counts founded on the law merchant, another on the law of France, and the third on an agreement between the parties, independent of, and collateral to, the subject matter of complaint contained in the two first sets of counts. That being so, these counts certainly do not, on the face of them, appear to be in violation of the rule; although it may probably turn out that there was, in point of fact, but one contract between the parties. Then, it is said, that the bill of particulars shews that there was but one cause of action. That, however, is not the true criterion by which to try the question. The correct one is, to see whether, on the face of the counts, they appear to be for the same cause of action.

ROLFE, B., concurred.

Rule discharged (a).

(a) See *Cahoon v. Burford*, post, p. 234.

STEVENSON v. THORNE.

The form of the writ of summons in Schedule I. of 2 Wm. 4, c. 39, must be strictly complied with; therefore, the Court set aside the copy and service of a writ, which omitted to mention the Court, in which an appearance was to be entered; though tested in the name of the Chief Baron.

In the affidavit in support of the

application, deponent described his residence differently from that in the writ, and made no allegation that he was the defendant in the cause.

Held, sufficient, it appearing that he was the party served.

THE copy of the writ of summons served in this case was as follows:—"Victoria, by the grace," &c., "to J. Thorne, the younger, of Little Stanhope-street, May Fair," &c. "We do command you that within," &c., "you do cause an appearance to be entered for you in our Court of in an action," &c. "Witness, Sir Frederick Pollock, at Westminster, the 30th day of May, in the year of our Lord, 1844."

Miller obtained a rule nisi to set aside the copy and service, on the ground that the copy was not according to the form prescribed by the 2 Wm. 4, c. 39, s. 1, schedule 1; inasmuch as it did not specify the Court in which the appearance was to be entered. In the affidavit on which

the rule was obtained, the deponent was described as "J. Thorne, the younger, of Great Church-lane, Hammersmith, in the county of Middlesex."

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Humfrey shewed cause, and objected that the affidavit was insufficient; inasmuch as the deponent was not described as defendant in the cause, *Johnson v. Smallwood* (a). The residence stated in the affidavit being different from that mentioned in the copy of the writ, it would *prima facie* seem, that the deponent was not the defendant.

Miller, contra. Whether the deponent is the real defendant or not, he is bound to come and set aside the service; otherwise the plaintiff might proceed to judgment and execution against him. The affidavit shews, that the deponent was the party served with the copy of the writ, and the fact of service makes him defendant, whether he is properly served, or only by mistake; therefore, it is unnecessary that he should describe himself as defendant in the cause. As to the discrepancy in the place of residence, it is enough to satisfy the statute, to state in the writ the place and county of the supposed residence. In *Johnson v. Smallwood*, the application was to set aside an appearance, on the ground that the applicant had never been served with a copy of the writ; therefore, in that case, it did not appear that he was the defendant.

POLLOCK, C. B.—There is no rule of Court which requires a party to describe himself as the defendant in the cause; and I think there is much weight in the argument, that in reality, the party served is, for some purposes at least, to be considered the defendant. Suppose, for instance, there were several persons of the same name, and the service was by mistake effected on the wrong person.

ALDERSON, B.—That is, no doubt, frequently done; but

(a) 2 Dowl. 586.

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the party served is not the less liable to answer because he is described by a wrong name.

Humfrey then argued that the omission of the Court in the copy of the writ was immaterial, as the writ was tested in the name of the Chief Baron of this Court.

PER CURIAM.—The form is required by act of Parliament, and must be strictly followed. The rule must be absolute.

Rule absolute.

HODGSON v. WARDEN.

To assumpsit against maker of a promissory note, defendant pleaded, (without profert,) an assignment of his property to trustees for the benefit of creditors, and that plaintiff and other creditors thereby released him from his debts. The plea then averred, that there never was but one part of the indenture, and that the same did not belong to the defendant, that he had no right to it, nor had he the custody of, nor any power or control over it, and that the same was rightfully in possession of the trustees, who refused to bring it into Court: *Held*, no excuse for profert.

ASSUMPSIT by payee against maker of a promissory note.

Plea. That after the making of the note, a certain indenture was made between the plaintiff, the defendant, one W. Sharp, and one J. Shore, and other creditors of the defendant, and was sealed and executed by the plaintiff, the defendant, and the other creditors. That the said indenture, after reciting that the defendant had assigned his property to Sharp and Shore, as trustees for the benefit of the plaintiff and his other creditors, stated, that the plaintiff and the other creditors granted to the defendant, that if the trustees should certify that the defendant had conformed to their directions, he should be released from his debts. The plea then averred that there never was but one part of the said indenture, executed by the said parties, and that the same did not belong to the defendant, that he had no right to it, nor had he the custody of, nor any power or control over it, and that he was wholly unable to procure the possession, power, or control over it; that it had been always, and still was, rightfully in the possession of the trustees, and that they had refused to permit the defendant to have the possession of it, or to bring it into Court. The plea then averred that the trustees certified that the defendant had conformed to their directions;

and that he had been released by the plaintiff from all liability upon the note.

Special demurrer, assigning for cause that the defendant being a party to the deed, and being the person claiming the benefit thereof, and of the release and certificate, was not entitled to plead the instrument in this action in manner and form as the same was attempted to be pleaded, without bringing the same into Court, and making profert thereof.

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M. D. Hill, in support of the demurrer. The defendant, who relies upon the release as a bar to the action, is bound to produce it. If he is unable to do so, it is his own fault, for he might have taken care that the release should be distinct from the deed of assignment. It is true, that a surety may plead a release to his principal without making profert of the deed; but the reason given by *Parke, B.*, is, that, "there is no privity between the surety and principal, for the surety contracts with the creditor. They do not constitute one person in law, and are not jointly liable to the plaintiff." *Bain v. Cooper (a)*. Here the plaintiff and defendant are both parties to the deed of release.

Chilton, *contra*. The defendant is not bound to make profert of the release. In *Bain v. Cooper*, *Parke, B.*, says, "The general rule with respect to making profert is correctly stated in *Dangerfield v. Thomas (b)*; viz., that a party is not required to make profert of an instrument, to the possession of which he is not entitled." In the present case, the parties entitled to the deed were the trustees who were to act under it. Formerly, the rule respecting profert was very strict, *Wymark's case (c)*; but it has been much relaxed in modern times. In *Read v. Brookman (d)*, it was first held that a deed might be pleaded as

(a) 1 Dowl. 11, N. S.; 8 M. 1 P. & D. 287.
& W. 751. (c) 5 Rep. 74.
(b) 9 A. & E. 292; See S. C. (d) 3 T. R. 151.

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lost by time and accident. He also referred to *Hill v. Marsden* (a), and *Wallis v. Harrison* (b).

POLLOCK, C. B.—The refusal by the trustees to produce the deed might render them liable to damages in an action at the suit of the defendant; but it will not warrant us in breaking through an established rule of law. There must be judgment for the plaintiff.

ALDERSON, B.—I am of the same opinion. In *Dr. Leyfield's case* (c), it is thus said, “And therefore it appears that it is dangerous to suffer any, who by the law in pleading, ought to shew the deed itself to the Court upon the general issue, to prove in evidence to a jury, by witnesses, that there was such a deed which they have heard and read; or to prove it by a copy: for the viciousness, rasures or interlineations, or other imperfections, in these cases, will not appear to the Court.” Where there is but one part of a deed, the holder of it is a trustee for the other parties.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the Plaintiff.

(a) 8 Dowl. 756; 6 M. & W.
 718.

(b) 4 M. & W. 538.
 (c) 10 Rep. 92, b.

CAHOON v. BURFORD.

A count for money had and received, will be allowed with a special count in assumpsit, for the breach of warranty of a horse, in which the breach was, that “the horse became and was of no value to the plaintiff, and that the plaintiff had been put to great expense in and about the feeding, keeping, and taking care of, &c., and returning the same to the defendant.”

ASSUMPSIT. The declaration contained two counts. The first was on the warranty of a horse in the usual form, the breach alleged being, “nevertheless the defendant did not, nor would perform or regard his said promise, but

warranty of a horse, in which the breach was, that “the horse became and was of no value to the plaintiff, and that the plaintiff had been put to great expense in and about the feeding, keeping, and taking care of, &c., and returning the same to the defendant.”

thereby deceived and defrauded the plaintiff, in this, to wit, that the said horse, at the time of the making of the said promise of the defendant, was not sound, but on the contrary thereof was then unsound; whereby the said horse then became, and was of no use or value to the plaintiff; and he, the plaintiff, hath been put to great charges and expense of his monies in and about the feeding, keeping, and taking care of the said horse, and returning the same to the defendant." The second count was for money had and received to the plaintiff's use. The particulars of demand stated, that the plaintiff sought to recover the price of the horse under the second count.

An application having been made at Chambers to strike out the second count, the same was referred by *Gurney, B.*, to the Court.

Miller now moved for a similar rule. The particulars shew, that the plaintiff has no claim under the second count, except that for which he may equally recover under the first. The two counts are substantially for the same cause of action, and in direct violation of the rule of Hilary Term, 4 Wm. 4, r. 5, which provides, that "several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each."

Jervis appeared to shew cause in the first instance.

ALDERSON, B.—The question is, does it appear on the face of the second count, that it is for the same cause of action as the first? It certainly does not; and it is plain that the two counts are not in respect of the same cause of action, since the first is for the recovery of damages for the breach of a warranty of a horse; but the second is to recover money paid to the defendant, on the ground that it was paid on a consideration which has failed. That count is for the price of the horse; whereas the preceding count is for unascertained damage, the true measure of which may, in some degree, be the price of the horse.

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GURNEY, B., and ROLFE, B., concurred.

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Rule refused (a).

(a) See *Gilbert v. Hales*, ante, p. 227.

CARTER v. JAMES.

To debt on an indenture for nonpayment of 600*l.*, and interest, the defendant pleaded by way of estoppel, the record in a prior action between the same parties on a bond, conditioned for payment of the same 600*l.* with interest, in which action the defendant had pleaded that the bond was given in pursuance of a corrupt agreement for the purpose of securing a certain debt and usurious interest; to which the plaintiff had replied, that the bond "was not made by the defendant in pursuance of, or upon the said corrupt and unlawful agreement, or for the purpose in the said pleadings mentioned;" and the said issue joined thereon, &c., had been found for the defendant.

DEBT. The declaration stated, that heretofore, to wit, on the 1st August, A. D. 1837, by a certain indenture then made between the defendant of the one part and the plaintiff of the other part, (proferet) after reciting as therein is recited, the defendant covenanted with the plaintiff that the defendant should and would well and truly pay, or cause to be paid unto the plaintiff, the full and clear sum of 600*l.*, with interest for the same after the rate of 5*l.* per cent. per annum from the day of the date of the said indenture, after the manner following: that is to say, the sum of 15*l.*, being one half-year's interest of the said sum of 600*l.*, after the rate aforesaid, on the first day of February then next ensuing; and the sum of 615*l.*, being the whole principal money, and another half-year's interest thereof after the rate aforesaid, on the 1st day of August, 1838, without any deduction, (prout patet, &c.) Breach, non-payment of principal or interest.

Plea: that the plaintiff ought not to be admitted or received to declare against the defendant, or implead him in respect of the said cause of action; because, he says, that before the commencement of this suit, to wit, on, &c., the plaintiff issued a writ of summons out of the Court of our lady the Queen, before the Queen herself, in an action of debt at his suit against the defendant, and impleaded the defendant thereon; and the defendant afterwards, to wit, on, &c., appeared to the said action in the said Court, and

Held, no estoppel in the present action; inasmuch as the fact of an usurious agreement was not in issue in the former action, nor was the same agreement admitted on the record, by reason of that allegation not having been traversed.

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the plaintiff afterwards, to wit, on, &c., by John Brooks, his attorney, declared in the said action against the defendant. [The plea then set out the declaration on a bond, dated 1st August, A. D. 1837, in the penal sum of 1200*l.*, with the condition as follows.]—The condition of the said writing obligatory was declared to be such, that if the defendant, his heirs, &c., should and would well and truly pay, or cause to be paid, unto the above named plaintiff, his executors, &c., the full and just sum of 600*l.*, together with interest for the same after the rate of 5*l.* per cent. per annum, from the day of the date of the said obligation, in the manner following: that is to say, the sum of 15*l.* being one half-year's interest of the said sum of 600*l.*, after the rate aforesaid, on the 1st day of February next ensuing the day of the date of the said obligation, and the sum of 615*l.*, being the whole of the said sum of 600*l.*, and another half-year's interest thereof, after the rate aforesaid, on the 1st day of August, in the year of our Lord, 1838, without any deduction or abatement whatsoever, (being the same principal sum and interest as was secured or was expressed and intended to be secured, to the plaintiff, his executors, &c., in and by a certain indenture of mortgage bearing even date with the said written obligation, and made or expressed to be made, between the defendant of one part and the plaintiff of the other part;) then the said obligation should be void and of none effect. [The declaration then proceeded to assign as a breach the non-payment of 630*l.*]—And thereupon, afterwards, to wit, on, &c., the defendant, by John Carter his attorney, came into the said Court and defended the said action, and therein pleaded to the said declaration, &c. (The first pleas were, non est factum, and fraud and covin.) And for a further plea in that behalf, the defendant said, that before the making of the said writing obligatory in the said declaration mentioned, and before the 29th day of July, A. D. 1839, to wit, on the 29th day of December, A. D. 1835, a certain sum of money, to wit, the sum of 124*l.* 15*s.* 6*d.* was due and owing from the defendant to the plaintiff, and that the defendant, being so

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indebted to the plaintiff, it was thereupon, before the said 29th day of July, A. D. 1839, to wit, on the day and year last aforesaid, corruptly and against the form of the statute in that case made and provided, agreed by and between the plaintiff and the defendant, that the plaintiff should forbear and give day of payment of the said sum of 124*l.* 15*s.* 6*d.*, from the day and year last aforesaid, until and upon a certain day, to wit, the first day of June, A.D. 1837, and that the defendant for the forbearing and giving day of payment of the said last mentioned sum, for the time aforesaid, should give and pay to the plaintiff more than lawful interest at and after the rate of 5*l.* per cent. per annum for the same ; that is to say, the sum of 10*l.* 10*s.* 1½*d.*; and that the defendant further said, that in pursuance of the said corrupt and unlawful agreement, the plaintiff did forbear and give day of payment of the said sum of 124*l.* 15*s.* 6*d.*, from the 29th day of December, A. D. 1835, until and upon the said 1st day of June, A. D. 1837, and the defendant further said, that the said sum of 124*l.* 15*s.* 6*d.*, and the said sum of 10*l.* 10*s.* 1½*d.*, being wholly due and unpaid, it was afterwards, to wit, on the said 1st day of August, A. D. 1837, corruptly and against the form of the statute in such case made and provided, further agreed by and between the plaintiff and the defendant, that the defendant for securing the payment of the same, (amongst other debts) to the plaintiff, should make and seal, and as his act and deed deliver to the plaintiff the said writing obligatory in the declaration mentioned ; that defendant did, to wit, on the day and year last aforesaid, in pursuance of the said last mentioned agreement, make and seal, and as his act and deed deliver to the plaintiff, the said writing in the said declaration mentioned ; and the plaintiff then accepted and received the same of and from the defendant, for securing to the plaintiff the payment of, amongst other monies, the said sum of 124*l.* 15*s.* 6*d.* and 10*l.* 10*s.* 1½*d.*, such illegal interest as aforesaid, contrary to the form of the statute, &c. ; and the defendant further averred that the said sum of 10*l.* 10*s.* 1½*d.*, so as aforesaid agreed to be given,

and paid to the plaintiff for the purpose aforesaid, exceeded the rate of 5*l.* for the forbearing of 100*l.* for one year, contrary to the form of the statute, &c., by means whereof, and by force of the said statute, the said writing was wholly void in law, and that the defendant was ready to verify, &c. (Then followed three pleas precisely similar, alleging a usurious contract in respect of the forbearance of two sums of 100*l.* and one of 86*l.*) And the plaintiff afterwards, to wit, on, &c., replied in the said action to the said pleas of the defendant as therein pleaded (first, similiter; secondly, denial of covin) and as to the plea of the defendant by him thirdly above pleaded, said, that the said writing obligatory in the said declaration in that action mentioned, was not made by the defendant in pursuance of, or upon the said corrupt and unlawful agreement, or for the purpose in the said third plea of the defendant, in the said action mentioned, modo et formâ. [Then followed similar replications to the other pleas of usury.] The plea then set out the award of venire, distringas, and the postea, which after stating that the jury found the issues on non est factum, and covin for the plaintiff, was as follows: And as to the third issue joined as aforesaid between the parties aforesaid, the jurors upon their oath aforesaid, did, then and there, say that the said writing obligatory, in the said declaration mentioned, was made by the defendant in pursuance of and upon the said corrupt and unlawful agreement, and for the purpose in the said third plea mentioned, modo et formâ. (There was the same finding upon all the other pleas of usury.) And the defendant further saith, that such further proceedings were thereupon afterwards had in the said action, that afterwards, to wit, on, &c., it was considered in and by the said Court, that the plaintiff take nothing by his said writ, but that he should be in mercy, &c. And that the defendant should go thereof without day, &c. And that the defendant should recover against the plaintiff 63*l.* for his costs and charges by him paid in and about his defence in that behalf, by the said Court adjudged to the defendant, and with his assent, according to the form of the statute in such case made and pro-

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vided. And that the defendant should have execution thereof, &c., (prout patet). And the defendant, in fact, saith, that the said indenture of mortgage in the said writing obligatory, and in the plaintiff's said declaration in the said former suit mentioned, and the said indenture in this declaration mentioned, are one and the same identical indenture, and not other or different indentures; and that the said sum of 600*l.* in the declaration in this suit mentioned, and in the said indenture mentioned, and the said sum of 600*l.* in the said condition to the said writing obligatory, and in the said declaration in the said former suit mentioned, are one and the same identical sum of 600*l.*, and not other or different sums of 600*l.*; and this the defendant is ready to verify, and is also ready to verify by the record; wherefore he prays judgment if the plaintiff ought to be admitted or received to declare or implead against the defendant in respect of the matters and causes contained in the said declaration contrary to the said recovery, record, and proceedings aforesaid.

Demurrer and joinder.

Crompton, in support of the demurrer. The alleged verdict and judgment are no estoppel. The allegation upon which issue is taken in the other action is unimportant with reference to this action. And even supposing that usury was there put in issue, the present plea is premature. It should not have been pleaded in the first instance, but the defendant should have waited until the plaintiff asserted something by which the defendant could estop him. Estoppels are odious to the law. The several kinds of estoppel are enumerated in *Coke upon Littleton*, 352 *a*, from which it will appear, that an estoppel arises by reason of a *res judicata*, but then it is confined to the same matter. There may, for some purposes, be an estoppel, by having passed over a particular matter in pleading, from which cause the practice of protestation was formerly resorted to. But an estoppel only binds where the very same point is again litigated. *Ferrer's case* (*a*), decided

(*a*) 6 Rep. 7.

that one barred in any action, real or personal, by judgment on demurrer, confession, or verdict, is barred as to that or the like action of the like nature of the same thing for ever. But if a demandant be barred in a real action by judgment on a verdict, demurrer, confession, &c.; yet he may have an action of a higher nature, and try the same right again. *Ferrer's case* is also to be found reported in *Cro. Eliz.* (a), and the pleadings are given at length in *Coke's Entries*, p. 38, b. In that case, the two causes of action were clearly identical. But a party is not bound, unless the subsequent action be of the like nature, and for the same cause as the first. The doctrine on this subject was fully considered in the case of *Outram v. Morewood* (b). This covenant may have been given to secure the debt and interest at five per cent. There are cases in which an estoppel immediately arises; as in *Doe v. Wright* (c), where in trespass for mesne profits, a recovery in ejectment was pleaded as an estoppel in reply to the pleas of liberum tenementum, and not possessed; and in *Eastmure v. Laws* (d), where it was held that a verdict found against a defendant on a plea of set-off, estopped him from suing the plaintiff for the demand specified in the set-off. But here the only matter in issue, was, whether or not the bond was given for an usurious consideration. It does not appear whether the bond or the covenant was given first; but, though the bond was illegal, the deed might be perfectly valid. Further, the usurious contract was not in issue in the other action, and it cannot be considered as admitted by the mere fact of its not being traversed.

Willis, contra. First, the question of usury has been decided in the other action. The existence of an usurious contract is admitted on the record, *Edmunds v. Groves* (e).

(a) p. 668.

(b) 3 East, 346.

(c) 10 A. & E. 763; See S. C. 2 P. & D. 672.

(d) 5 Bing. N. C. 444; See S. C. 7 Scott, 461; 7 Dowl. 431.

(e) 5 Dowl. 775; 2 M. & W. 642.

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[*Alderson, B.*—The Court of Queen's Bench differed with me in the case of *Bingham v. Stanley* (a), but in my opinion, both cases may well stand together. In actions on bills of exchange, the declaration is susceptible of two meanings. An indorsement may either be an indorsement by writing the name, or an indorsement for a valuable consideration; the plea would give it a different meaning according to the fact. If the plea states that the bill was an accommodation bill, then the allegation of indorsement in the declaration must mean an indorsement for a valuable consideration; and when the replication alleges that the bill was indorsed for a valuable consideration, that is merely an explanation of the original averment of indorsement in the declaration. In that way, the cases in this Court and in the Court of Queen's Bench may be reconciled. In *Smith v. Martin* (b), this Court held, that in the case of notice, the issue was on the defendant; because the declaration contained no averment which negatived knowledge, and it was for the first time introduced in the plea. I am quite satisfied that *Bingham v. Stanley* is rightly decided; though I do not agree with the reasons which are given.] There is a distinction between the case of a simple proposition put in issue, and where the traverse is incapable of being understood by the jury, except in connection with some other fact. In *Bingham v. Stanley*, the sole question was, whether or not there was any consideration; but in this case the fact of the bond having been given in pursuance of an usurious agreement, depended upon the fact of the existence of an usurious agreement. [*Alderson, B.*—If an admission on the record is to be taken for all purposes, I am not sure that it may not be used for the purpose of discrediting the witnesses.] The true test is to consider how the matter would have stood at the trial, and there the issue was, whether or not the bond was given in pursuance of the illegal agreement mentioned in the plea.

POLLOCK, C. B.—There must be judgment for the plain-

(a) 2 Q. B. 117; See S. C. 1 G. & D. 237.

(b) 1 Dowl. 418, N. S.; See S. C. 9 M. & W. 304.

tiff. The plea contains no averment that this indenture was given in pursuance of the corrupt agreement; and from anything which appears on this record, the mortgage deed was valid, though the bond was corrupt. We are all of opinion, that this case ought to be decided in accordance with the decision of the Court of Queen's Bench in the action on the bond (a). The present action is brought on an indenture of mortgage, and the plea in substance is, that in the year 1841, the plaintiff impleaded the defendant, and declared upon a bond, to which declaration the defendant pleaded non est factum, covin, and usury; the plaintiff replied to the latter plea, that the bond was not given in pursuance of the corrupt agreement in the plea mentioned, and the jury found that issue for the defendant. Now, the question is, whether, in the present action, such finding concludes the plaintiff by estoppel, that there was that usurious agreement; and whether the defendant can plead it, without the plaintiff first denying usury. We are all of opinion, that the judgment of the Court of Queen's Bench is right; and if any doubt existed, we must decide in accordance with it. The plea in the former action was, that there was a corrupt agreement quite irrespective of the bond, and then the plea goes on to aver, that the bond was given with reference to that corrupt agreement. My Brother *Coleridge* ruled, that in his judgment, the usurious agreement was not in issue; and the Court afterwards decided, in accordance with that opinion. Under those circumstances, the present plea, which seeks to shut out the plaintiff altogether from contending, that the agreement was not, in point of fact, usurious, cannot be sustained.

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ALDERSON, B.—In order to make a good estoppel, it must be shewn that the same point has been previously decided. This is an action on a mortgage deed, for 600*l*.

(a) The case is not reported; but *Watson*, amicus curiæ, stated, that he was counsel in the cause, and that *Coleridge*, J., ruled, that the question, whether the agree-
ment was usurious, was not in issue; and that the Court of Queen's Bench afterwards refused to grant a new trial.

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and interest; the plea sets out the record in an action against the present defendant, on a bond in the penal sum of 1200*l.*, for the purpose of securing 600*l.* and interest. With respect to that bond it appears, that the present defendant pleaded, amongst other pleas, that there was a corrupt and usurious contract between him and the plaintiff with respect to 124*l.*, and that in order to induce the plaintiff to forbear payment of that sum, the defendant agreed to pay him more than the lawful rate of interest, and that a certain amount of interest became due in respect of that sum, and that the bond was given to secure that principal sum and interest. There were other pleas of other corrupt agreements, in respect of different sums, and each plea went on to allege, that the bond was given in respect of them. Issue having been taken on that allegation, the whole which the jury had to try was, whether the bond was given for those debts and interest. The jury found that fact in the affirmative, and it was instantly taken for granted, that if given for those debts and interest, the interest was usurious, because the former averment was not in issue by a denial of the plea. Therefore, if the plaintiff is now to be estopped by an admission on the record, when the point in issue did not raise the question, he would be estopped by matter which was never in dispute, and upon which the jury have never given any judgment. The plaintiff is estopped from saying, that there is any debt to be recovered on that bond, or from saying that any issue decided by the jury, has been improperly decided; but he is not estopped by any admission on the record. If the fiat had been protested according to the ancient custom, it would not have been considered as conclusively admitted in any other action. There, therefore, seems to be no authority for what is said by the Court of Queen's Bench in the case of *Bingham v. Stanley* (a); though I should also have come to the same conclusion upon those pleadings, but for different reasons. I shall only use that authority as a guide, and not as a direction; and, notwithstanding what is there said, I

(a) 2 Q. B. 117; See S. C. 1 G. & D. 237.

am also convinced, that I am right in saying, that this plaintiff is not estopped from contesting the question of usury.

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GURNEY, B., and ROLFE, B., concurred.

Judgment for Plaintiff.

BAILEY v. BIDWELL.

ASSUMPSIT by indorsee against maker of a promissory note.

Plea: that defendant, in pursuance of the 5 & 6 Vict. c. 116, presented a petition to the Court of Bankruptcy, for protection from process against his person: that one E. C. Bailey was at that time a creditor of the defendant, and had threatened to shew cause against a final order being made, unless the defendant would make his promissory note payable to the said E. C. Bailey: that under pressure and in consequence of such threat, he made the said promissory note, and that the same was indorsed to the plaintiff without consideration.

The attorney who signs an insolvent's petition for protection under the 5 & 6 Vict. c. 116, is not an attesting witness and need not be called to prove it.

At the trial, before *Parke*, B., at the sittings in this Term, the defendant's counsel tendered in evidence the petition signed by the defendant, and which also bore the signature of the defendant's attorney, as required by a rule of the Court of Bankruptcy. It was then proposed to prove the defendant's signature, by a person who was present when he wrote it. It was objected, on the part of the plaintiff, that such evidence was insufficient; and that the attorney who witnessed the petition, ought to be called. The learned Judge overruled the objection, and a verdict was found for the defendant.

Bramwell moved for a new trial, on the ground of the improper reception of this evidence; and submitted, that the attorney, whose name appeared on the petition, was, in fact, an attesting witness, and should have been called. In

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Higgs v. Dixon (a), it was held, that an attesting witness, who had signed a warrant of distress, ought to have been called to prove it.

PARKE, B.—There will be no rule. It was clearly unnecessary to call the attorney who signed the petition. That document was produced from the Court where it ought to be kept, and that is sufficient.

ALDERSON, B.—The party who is called an attesting witness, is not in fact an attesting witness; but only a person appointed by the Court to sign the petition. He merely signs it in obedience to a rule of the Court of Bankruptcy.

Rule refused.

(a) 2 Stark. N. P. C. 180.

WHELDAL v. The EASTERN COUNTIES RAILWAY COMPANY.

The copy of an affidavit of increase delivered under Reg., M. T., 1 Wm. 4, r. 10, must contain a copy of the jurat also; the words "Sworn, &c.," are insufficient. But the above omission is no ground for setting aside the judgment, but only for reviewing the taxation of costs.

THIS was a rule, calling on the defendants to shew cause why the judgment signed in this cause should not be set aside, or why the Master should not review his taxation, and why the defendants should not pay the costs of the application. The objection was, that the judgment was irregular, inasmuch as that the rule of Michaelmas Term, 1 Wm. 4, r. 10, had not been complied with. That rule directs, "That one day's previous notice of the time of taxing costs, upon rules, orders, town posteaes, and inquisitions, and a copy of the bill of costs and affidavits to increase (if any) shall be given and delivered, by the attorney or attorneys of the party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of the service of such notice; and that in the cases of posteaes and inquisitions in country causes, the notice shall be given two days, and a copy and affidavit delivered two days before such taxation."

A copy of the affidavit of increase was delivered with the jurat, thus,—“Sworn, &c.”

Jervis shewed cause. The rule has been, in substance, complied with; its only object being to afford the opposite party information respecting the costs about to be taxed. It will, perhaps, be said that *Todd v. Fellingham* (a) is conclusive in favour of this application; but, in that case, the affidavit was not sworn to at the time the copy was delivered, nor until the day on which the costs were taxed. At all events, the plaintiff is not entitled to costs; since the omission to comply with the rule is no ground for setting aside the judgment, but only for reviewing the taxation, *Taylor v. Murray* (b).

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Lush, in support of the rule. *Taylor v. Murray* is distinguishable; because there the judgment was for the plaintiff, and would, consequently, be for debt, or damages and costs; here it is for costs only.

PER CURIAM.—The rule must be absolute for reviewing the taxation, but without costs. *Taylor v. Murray* is directly in point. A document is not an affidavit, until it is sworn; and a copy of an affidavit ought to contain a copy of the jurat also.

Rule absolute, accordingly.

(a) 8 Dowl. 372.

(b) 6 Dowl. 80; See S. C. 3 M. & W. 141.

JONES v. WILLIAMS.

TRESPASS *quare clausum fregit*. The defendant pleaded not guilty, not possessed, *liberum tenementum*, and a special plea of justification, which went to the whole cause of action. The cause was tried before *Gurney*, B., at the Summer Assizes, 1842, when a verdict was found for the plaintiff on the three first issues, with one shilling

An application having been made to a Judge at Nisi Prius, to certify under the 3 & 4 Vict. c. 24, that the action was brought to try a right, &c.; the

Judge consented to grant the certificate, but the associate omitted to make any indorsement on the record. Two years afterwards, the certificate was drawn up and signed by the Judge: *Held*, that as the application for the certificate was made and granted in open Court, it must be considered that the parties consented to its proper entry on the record.

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damages, and for the defendant on the last issue. In Hilary Term, 1843, the plaintiff obtained a rule absolute to enter judgment for him on the last issue, non obstante veredicto. In Trinity Term, 1843, the defendant obtained a rule absolute for a new trial, upon payment of costs. The costs not having been paid, that rule was afterwards discharged. On the 23rd of May, 1844, application was made to *Gurney, B.*, to certify under the 3 & 4 Vict. c. 24, that the action was brought to try a right besides the mere right to recover damages. A similar application had been made at the time the verdict was returned, and also for the costs of the special jury; the associate drew up the certificate as to the special jury only. The learned Judge referred to his note made at the time, which was "I will certify, if necessary," and he granted the certificate.

Welsby had obtained a rule nisi to rescind the certificate.

Erle and *Townsend* shewed cause. It clearly appears that at the time of the trial, the learned Judge decided on granting the certificate. The omission to make the necessary indorsement on the record, must be considered as a misprision of the clerk, which the Court has power to rectify. In *Shuttleworth v. Cocker (a)*, it was held, that an insufficient entry might be amended. In that case, *Tindal, C. J.*, says, "What I ground my judgment on is this, that the certificate was granted immediately after the verdict, and that that which was then done, and of which advantage is now sought to be taken, was no more than a mistake or misprision of the officer who handed up the record erroneously indorsed, as it now appears." And *Coltman, J.* says, "As to the certificate itself, I think that where a Judge has directed an officer to make an entry, and that entry is erroneously drawn by the officer, and not in conformity with the order of the Judge, the Judge may subsequently correct it on his own knowledge, in order that it may be entered nunc pro tunc." The plea found for the defendant

(a) 9 Dowl. 84; See S. C. 2 Scott, N. R. 47; 1 M. & G. 829.

turned out to be bad in law. [*Alderson*, B.—Though a defendant has a verdict upon a plea which covers the whole cause of action, the Judge may, nevertheless, certify to give the plaintiff the costs of a special jury; and if the plea is ultimately held to be bad, the certificate will come into force: so here, though there is a plea covering the whole cause of action found for defendant; yet as there are other pleas found for the plaintiff, the Judge might certify, and if the former plea turns out to be bad, the certificate will be good as to all.] A liberal construction has been put on this statute, and the word “immediately” has been construed to mean within a reasonable time, *Thompson v. Gibson* (a). In the 22 and 23 Car. 2, c. 9, the words were, “in all actions of trespass, &c., wherein the Judge, at the trial of the cause, shall not find and certify;” &c.; yet it was held, that a certificate given four days after the trial, but before the Judge had left the assize town, was in sufficient time, *Johnson v. Stanton* (b). *Davis v. Cole* (c), is also an authority in favour of the certificate.

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Jervis and *Welsby* in support of the rule. The learned Judge had no authority to grant the certificate after the lapse of two years from the time of trial, and after the commission had expired. Besides, the statute only gives power to certify in the event of damages found for the plaintiff; but in this case, damages could not in strictness be found, since the defendant had a verdict on the plea which covered the whole cause of action.

Cur. adv. vult.

GURNEY, B., (on a subsequent day,) said, that inasmuch as the application for the certificate was made in open Court, and then granted; the Court considered that there was a consent of all parties to its being entered on the record: therefore, the rule must be discharged.

Rule discharged.

(a) 9 Dowl. 717; See S. C. 8 D. & R. 156.
M. & W. 281.

(c) 8 Dowl. 732; 6 M. & W.

(b) 2 B. & C. 621; See S. C. 4 624.

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SOLLY v. LANGFORD.

A rule was made absolute for a new trial, on payment of costs by the plaintiff. The costs were taxed, and demanded on the 4th of May. On the 8th, the defendant obtained a rule nisi to discharge that rule, unless the costs were paid before the fourth day of the ensuing Term. The plaintiff having, in the mean time, paid the costs; the Court discharged the rule, but ordered the plaintiff to pay the costs of the application.

THIS cause was tried at the Middlesex Sittings, after last Hilary Term, and a verdict found for the defendant. On the 26th of April, a rule was made absolute to set aside the verdict, and to have a new trial on payment of costs. The costs were accordingly taxed, and on the 4th of May, the Master gave his allocatur for 44*l.* 19*s.*, which was delivered to the plaintiff's attorney, with a demand of payment. The costs not having been paid,

Jervis, (on the 8th of May,) obtained a rule, calling on the plaintiff, to shew cause why the rule for a new trial should not be discharged; unless the costs were paid as ordered by the said rule to the defendant or his attorney, on or before the 4th day of next Trinity Term; and why the plaintiff should not pay the costs of that application.

Petersdorff shewed cause upon affidavit, that the 44*l.* 19*s.* was paid on the 21st of May; and he submitted, that the plaintiff was, therefore, entitled to have the rule discharged without costs.

Jervis contrà, cited *Champion v. Griffiths* (a), where a rule for a new trial, on payment of costs, had been granted, but the costs were not paid within a reasonable time; the Court made a rule absolute in the first instance, for discharging that rule.

PER CURIAM.—This rule must be discharged; the plaintiff to pay the costs of the application.

Rule accordingly.

(a) 1 Dowl. 319, N. S.

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BROWN and Another v. FULLERTON (a).

THIS was a rule, calling on the defendant to shew cause why the plaintiffs should not be at liberty to amend the writ of summons and subsequent proceedings, by adding the name of another plaintiff. The writ required the defendant (in the usual form) to enter an appearance "at the suit of William Brown and George Roberts," (not stating in what character they sued). The affidavit in support of the application disclosed that the plaintiffs sued as the assignees of one Blake, a bankrupt; and that it was now sought to add the name of the official assignee, otherwise the debt would be barred by the Statute of Limitations.

A writ of summons may be amended by adding the name of a plaintiff, where it appears that the debt would otherwise be barred by the Statute of Limitations.

Gray shewed cause. The Court have no power to make the amendment. In *Baker v. Neaver* (b), this Court amended the declaration by adding the name of the official assignee; but that case was decided very recently after the passing of the act of Parliament appointing official assignees. The only instances in which similar amendments have been allowed, are cases in this Court. In *Horton v. The Inhabitants of Stamford* (c), the writ was amended by substituting the word "borough" for "hundred;" and in *Lakin v. Watson* (d), the proceedings were amended, after plea in abatement, by adding the name of a co-executor. But in the Court of Queen's Bench, the Judges have repudiated the power to make such amendments. That Court refused to amend a writ after plea in abatement, by adding another defendant, *Roberts v. Bate* (e). There Lord Denman, C. J., after adverting to the decisions of this Court, says, "I have every possible disposition to bow to any decision adopted, on consideration, by the Court of Exchequer, or any other Court; but I doubt the power of the Courts to do any such

(a) This case was decided in Dowl. 96.
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(b) 1 C. & M. 112; See S. C. 1
Dowl. 616.

(c) 1 C. & M. 773; See S. C. 2

(d) 2 Dowl. 633; 2 C. & M.
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(e) 6 A. & E. 778.

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thing as was there done. I doubt whether parties named on writs, and having, by the manner in which they are named, certain defined rights, are to be deprived of them by an alteration which the opposite party finds necessary in consequence of his own mistake." And *Patteson*, J., says, "the only case directly in point, is *Lakin v. Watson*. In the other cases cited, there was no plea in abatement; and, except in one, no other party was added. In *Lakin v. Watson*, the Court of Exchequer did allow the amendment; but, with all respect for that Court, I cannot see why the amendment should be permitted for the purpose of saving the Statute of Limitations, more than on any other account." [Pollock, C. B.—*Roberts v. Bate* was the case of adding a defendant, about which there is great difficulty. It is more unreasonable to call on a defendant, who has had no notice, to come in and be a party to the suit; than to add a plaintiff who is desirous to be joined. In that respect, *Roberts v. Bate* is distinguishable from this case, in which the only party not before the Court is an official party. It might not only be a great hardship to make the rule absolute in invitum, but in what way is a defendant to be served? In *Baker v. Neaver*, the writ might have issued in Vacation before the Uniformity of Process Act came into operation.] *Euebanke v. Owen* (a) was a case in which the Court would have made the amendment, if it had had the power. There a married woman, whose husband lived abroad, rented premises in her own name, not stating whether she was married or single. Having paid rent to one person, she was distrained upon by another, who claimed to be landlord. She replevied, and the defendant pleaded that she was a married woman. A Judge at Chambers, having ordered the proceeding to be amended, by inserting the husband's name, unless the defendant withdrew his plea and avowed; the Court held that the Judge had no power to make such order, though in a case of obvious oppression. [Parke, B.—What I am reported to have said in the case of *Lakin v. Watson* is not correct. Shortly after the passing of the act

(a) 5 A. & E. 298; S. C. 6 N. & M. 799.

for the amendment of process, there was a meeting of the Judges for the purpose of considering the propriety of allowing writs to be amended in future. Before that act, the practice went so far as to allow a plaintiff to be added, even after a plea of nonjoinder; at least, I know it to have been done at Chambers upon this condition, that if the defendant did not recover in the action, he should be excused from the payment of costs up to the time of the amendment. After the Uniformity of Process Act passed, the Judges resolved, that for the future, no amendment should be allowed. That was found to be inconvenient; but this Court never allowed the amendment, except in two cases. The one was, where the name of a plaintiff had been left out by mistake, and contrary to instructions; the other was, where the debt would have been barred by the Statute of Limitations. This Court considered, that where the statute would otherwise be a bar, it had a right to amend a writ as under the old practice. With respect to adding a defendant, there is a difficulty which does not exist in the case of a plaintiff.] The Uniformity of Process Act, (2 Wm. 4, c. 39,) contains provisions as to the mode of issuing writs, which must be strictly complied with. A parchment, having the seal of the Court, stands as a valid writ; but where it is altered by inserting the name of a third party, it has no longer any force. The 12th section requires that every writ shall bear date on the day when it issued; but a writ which is amended, cannot be said to have issued at the time of its date. [*Rolfe*, B.—Your argument must go to this extent, that the Court has no power to make an alteration under any circumstances?] The writ should be resealed. [*Parke*, B.—Then, if the alteration were made after declaration, there would be no writ to support it.] The writ can have no validity, unless issued according to the provisions of the 1st section; which it is not, if altered, unless resealed. [*Parke*, B.—That is, if the alteration be made by the party; but not if made by order of the Court or a Judge. Under the old form of writ, if the alteration were made by a Judge's order, it was not

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necessary to reseal the writ; but if the party chose to alter the return, then the writ must have been resealed.] In *Footte v. Collins* (a), a writ of right issued before the 3 & 4 Wm. 4, c. 27, came into operation. After that statute passed, the writ was altered as to the day of return and resealed. The Lord Chancellor set aside the writ, the teste not having been altered. [*Pollock*, C. B.—There has always been some strictness in construing the limitation as to real actions, and a disposition to relax in the case of contracts.] It would be in direct contravention of the Statute of Limitations, to allow such an amendment; a right of protection from that statute having already vested in the defendant. Suppose that after amendment, it became necessary to indict upon an affidavit sworn before the amendment, the affidavit, when produced in evidence, would not appear to be entitled in the cause. [*Pollock*, C. B.—I do not think there would be any difficulty in that respect.] This writ does not state the character in which the plaintiffs sue. Possibly they may have a cause of action in their own right.

Hugh Hill, in support of the rule. In an action at the suit of the assignees of a bankrupt, it is not usual to describe them as such in the writ. In *Baker v. Neaver*, the application was made after declaration. In *Horton v. The Inhabitants of Stamford*, Bayley, B., refers to the practice of allowing amendments in penal actions. The Statute of Limitations was never intended to be an instrument enabling defendants to perpetrate fraud, but only to protect parties who had lost evidence of the payment of a debt. *Lakin v. Watson*, was decided after the Uniformity of Process Act passed. In *Eccles v. Cole* (b), this Court amended a writ of summons by altering the cause of action, from “debt,” to “promises,” though more than four months had elapsed from the date of the writ. *Footte v. Collins*, was the case of an alteration made by the party himself. In *Williams v.*

(a) 1 Myl. & Cr. 250.

(b) 1 Dowl. 34, N. S.; 8 M. & W. 537.

Williams (a), the Court allowed the memorandum and appearance required by the 2 Wm. 4, c. 39, s. 10, to prevent the operation of the Statute of Limitations to be amended, and the roll made conformable to it, after an amendment on demurrer to a replication to a plea of the Statute of Limitations (b). In *Palmer v. Beale* (c), the record was amended by striking out the name of one of the defendants. This case does not differ in principle from those in which amendments were allowed before the Uniformity of Process Act. The general rule then, was, that an amendment in the process could not be made after two Terms; but in *Billing v. Flight* (d), the cause of action was altered from *assumpsit* to debt after the lapse of six Terms. In *Storr v. Watson* (e), the declaration was amended, by substituting a count in *trover* for a count in *case*.

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POLLOCK, C. B.—We will consult the other Judges, and endeavour to lay down some rule of practice common to all the Courts.

Cur. adv. vult.

On a subsequent day, *Parke*, B., said.—This was a case in which an application was made to amend a writ of summons, by adding the name of a plaintiff; and it appeared, that unless the amendment were allowed, the Statute of Limitations would be a bar. Some doubt was entertained, as to whether we ought to accede to the motion, which is in accordance with the precedents in this Court. The Court think that the rule ought to be made absolute, on payment of costs.

Rule absolute.

(a) 2 Dowl. 209, N. S.; 10 M. & W. 174.

(b) See *Mavor v. Spalding*, ante, vol. 1, p. 878.

(c) 9 Dowl. 529.

(d) 6 Taunt. 419; See S. C. 2 Marsh. 124.

(e) 2 Scott, 842.

COURT OF COMMON PLEAS.

Trinity Term.

IN THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

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BROOKS and Another v. HODSON.

An irregular execution against the defendant was levied on the 1st of March. The sale took place on the 7th of March, and thirteen following days. On the 14th of March, a docket in bankruptcy was struck against the defendant, and notice thereof, and of an act of bankruptcy committed, was given the same day, by the attorney of the petitioning creditors to the plaintiff, and to the sheriff. On the 15th of March, a fiat issued against the defendant, under which he was adjudged bankrupt, and assignees were appointed on the 12th of April. On the 13th of April, the assignees gave notice to the sheriff, that they claimed the proceeds of the sale: and on the 25th, a rule was obtained on their behalf to set aside the judgment and execution for irregularity. The judgment roll was not carried in till the 19th of April: *Held*, that the motion was not too late.

SIR T. WILDE, Serjt., had obtained a rule (a) on behalf of the assignees of the defendant, who had become a bankrupt, to set aside the judgment and writ of execution in this cause for irregularity; the judgment not having been signed in pursuance of the Judge's order obtained to that effect, and the writ of execution varying in terms from the judgment.

Channell, Serjt., had obtained a cross rule to amend.

Both rules now coming on together,

Channell, Serjt., admitted, that according to the case of *Webber v. Hutchins* (b), the rights of the assignees having in the mean time intervened, he could not sustain his rule.

He then shewed cause, (*Byles*, Serjt., with him), against the former rule.

The facts of the case were shortly these. An irregular

(a) In Easter Term, on the 25th of April.

(b) 8 M. & W. 319; See S. C. 1 Dowl. 95, N. S.

judgment had been signed against the defendant in the above action on the 24th of February, 1844; and a writ of *fi. fa.*, which varied in terms from the judgment, issued to the sheriff of Herefordshire, on the 29th of the same month, under which the goods of the defendant were seized on the 1st of March. The sale under the execution took place on the 7th of March, and the thirteen following days. On the 14th of March a docket in bankruptcy was struck against the defendant, and notice thereof, and of an act of bankruptcy committed, was given by the attorney of the petitioning creditors, to the plaintiffs and to the sheriff. On the 15th of March the fiat issued, and on the 4th of April the defendant was adjudged bankrupt, and the official assignee appointed. On the 12th of April, the present assignees were appointed, and on the 13th, they gave notice to the sheriff that they claimed the proceeds of the sale. On the 23rd of April, counsel were instructed; and on the 25th, the present rule was obtained.

It was submitted, on the part of the plaintiffs, that the bankrupt himself could not have made this application; and if not the bankrupt, then neither could his assignees. But even if they stood in a different relation for the purposes of this application, they were still too late. There was no reason assigned for the delay, from the 12th of April, when they were appointed, till the 25th, when the motion was made; particularly as they must have had notice on the 13th, of the irregularity; for they desired the sheriff on that day, to retain the proceeds of the sale. *Weedon v. Garcia* (a) shews they were too late.

Sir T. Wilde, in support of the rule. In this case the plaintiffs did not carry in the roll till the 19th of April. Notice was given to the sheriff not to pay over the proceeds on the 13th of April, and that the execution would be disputed. [*Cresswell*, J.—It does not appear in *Weedon v.*

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Garcia, that any notice was there given to the sheriff.] Instructions were given to counsel on the 22nd of April, to make this application, and the motion was accordingly made on the 25th. (He was then stopped by the Court.)

PER CURIAM,

Rule absolute ; no action to be brought against the Plaintiffs.

BONZI and Another v. STEWART (a).

Trover for certain bales of silk. Plea as to four bales, parcel, &c., that D. A. & Co., were the factors of the plaintiffs, and were intrusted by them with certain dock warrants for the delivery of the said four bales of silk ; that D. A. & Co. had applied to the defendant for an advance of money upon the pledge of the said four bales of silk ; that it was agreed between the defendant and D. A. & Co., that D. A. & Co. should pledge with the defendant, the said four bales of silk as

THIS was an action of trover for certain bales of silk ; to which the defendant had pleaded various pleas, of which the following was

The third plea: As to four bales of silk, parcel, &c., that at the several times thereafter mentioned, certain persons using the style, firm, and description of Douglas, Anderson & Co., were the factors and agents of the plaintiffs in the City of London ; that at the time of the delivery of the dock warrants hereinafter mentioned, the said four bales of silk, parcel, &c., were deposited and warehoused in the warehouse of the Saint Katharine's Dock Company, and the said Douglas, Anderson & Co., were before, and at the time of the pledge, and of the delivery of the dock warrants hereinafter next mentioned, as such factors and agents as aforesaid, intrusted by the plaintiffs with, and were then in possession of, divers, to wit, four dock warrants for the delivery of the said four bales of silk, parcel, &c., and in which said dock warrants, the said four bales of silk,

(a) See this case reported on 5 Scott, N. R. 1 ; and also again another point, 4 M. & G. 295 ; S. C. on demurrer, *post*, H. T. 1845.

a security for the money. The plea further alleged the delivery of the dock warrants, the pledging of the said bales of silk, and an advance of money thereupon, and so justified the detaining of the goods. Replication, that D. A. & Co., were not so intrusted with the said dock warrants, &c. : nor did they agree with the defendant for the pledge of the said four bales of silk, &c. : *Held*, bad, on special demurrer, for duplicity.

parcel, &c., were described and mentioned; that the said Douglas, Anderson & Co., being so intrusted with, and in possession of the said dock warrants, applied to the defendant for the loan and advance of a certain sum of money, to wit, the sum of one thousand nine hundred pounds, upon the pledge of the said four bales of silk, parcel, &c., as a security for the re-payment of the said sum of money; that, thereupon, heretofore, to wit, on, &c., it was agreed between the defendant and the said Douglas, Anderson & Co., that the said Douglas, Anderson & Co. should pledge with the defendant, the said four bales of silk, parcel, &c., as a security for the said sum of money to be advanced by the defendant, and which said sum of money the defendant then agreed to advance to the said Douglas, Anderson & Co., upon the faith of the said dock warrants; that the said Douglas, Anderson & Co. being so intrusted with and in possession of the said dock warrants, in pursuance of the said agreement, heretofore, to wit, on &c., last aforesaid, did deliver to the defendant the said dock warrants, and did pledge with the defendant, the said four bales of silk, parcel, &c., as a security for the said sum of money, and which said sum of money the defendant did then and there advance and lend to the said Douglas, Anderson & Co., upon the faith of the said four dock warrants; that defendant had not notice before or at the time of the said pledge, or before or at the time of advancing and lending the said money by the said dock warrants or either of them, or otherwise, that the said Douglas, Anderson & Co. were not the actual and bonâ fide owners and proprietors of the said four bales of silk, parcel, &c., so pledged as aforesaid; and that defendant at the said time, when, &c., detained and still detains the said four bales of silk, under and by virtue of the said pledge as aforesaid, and for and on account of the said sum of money so advanced as aforesaid, which still remains unpaid, which is the said conversion thereof in the said declaration mentioned. Verification, &c.

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The fourth, fifth, sixth, and seventh pleas were similar in effect, but varying as to the number of bales, and in some other particulars.

The replication to the third plea: That the said Douglas, Anderson & Co., were not so intrusted with, and in possession of, the dock warrants in that plea mentioned, or of any or either of them; nor did they agree with the defendant for the pledge of the said four bales of silk, parcel, &c., or of any part thereof, in manner and form, &c.

The replications to the other pleas were similar to the above.

Special demurrer to the above replication, assigning duplicity.

There were special demurrers to the replications to the fourth, fifth, sixth, and seventh pleas for the same cause.

Joinder in demurrer.

The points marked for argument on the part of the defendants were:

"That the replications demurred to are bad for duplicity, as putting in issue the fact of Douglas, Anderson & Co. being intrusted with the dock warrants, and also the fact that they made the agreement to pledge: That the plaintiffs ought to have selected one of the said two facts: That the two facts do not make one connected proposition, so as to justify the form of replication adopted by the plaintiffs."

Shee, Serjt., (*Butt* was with him,) in support of the demurrer. It will be contended, by the other side, that this replication is not open to the objection of duplicity, because it is a traverse of one connected proposition advanced in the plea; namely, that a valid pledge was made of the goods by Douglas, Anderson & Co., under the Factors' Act; and that whenever a number of facts must necessarily and contemporaneously concur towards the establishment of a legal proposition, such proposition so made up of several facts, may be traversed in a conjunctive form. 'The general rule, however, on this subject, is, that no pleading may contain more than one distinct answer to that which

preceded it, *Stephen on Pleading*, p. 79, 4th ed. That answer may consist of one fact or fifty facts, without duplicity; provided they all amount to but *one answer* to the previous pleading, and are all necessary component parts of that answer. "Every plea to be well pleaded, however numerous the facts stated in it, must constitute but one single answer," says Mr. Justice *Patteson*, in the case of *Selby v. Bardons* (a). If a traverse can be taken on all the facts stated in the preceding pleading, without giving more than one answer to it, or offering more than one point of defence, such traverse is good. But it is not true, that whenever a number of facts in a preceding pleading, constitute a single defence, a traverse may be taken on them all conjunctively. It may, if such traverse be but one answer to the previous pleading, but not otherwise; for if by traversing more than one material fact, the absence of which would destroy the previous pleading, more than one answer is given to that pleading; more than one issue is raised, and the whole object of special pleading is defeated. In all the cases, in which a traverse of several material facts stated in the former pleading, has been held good, it will be found, that those several facts amounted to one single proposition;—not merely to one single defence; and, therefore, that the denial of them constituted but one answer to the former pleading, and could tend to no more than one issue. Thus in *Robinson v. Rayley* (b), the replication, in effect, was, that the cattle were not entitled to common. In *Bell v. Tuckett* (c) that there was no release. In *Bennison v. Thelwell* (d), the replication not only contained but one defence, but was, in fact, but one proposition. So in *Webb v. Weatherby* (e), the replication was good, because the plea contained only one proposition, namely, that the insolvent received the money in satisfaction. The same observation also applies to the cases of *Brogden v.*

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(a) 3 B. & Ad. 9.

(d) 7 M. & W. 512; See S. C.

(b) 1 Burr. 316.

9 Dowl. 739.

(c) 3 M. & G. 735; See S. C.

(e) 1 Scott, 477; See S. C.

1 Dowl. 458, N. S.; 4 Scott, 1 Bing. N. C. 502.

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Marriott (a), and *Pigeon v. Osborn (b)*. The case of *Ransford v. Copeland (c)* only shews that a traverse may be taken on a mixed question of law and fact. The replication de injuriâ, if it be thought an exception to the general rule on this subject, rests, as all the Judges seemed to admit, in the case of *Selby v. Bardons (d)*, not on principle, but on authority. Its application, moreover, is subject to the rules in *Crogate's case (e)*, and, therefore, its use could not be justified in the present instance, where the defence is an authority from the plaintiff; *Purchell v. Salter (f)*, and *Salter v. Purchell (g)*. But it is submitted, that the instances in which this form of replication has been held good, are also cases in which but one single proposition has been involved. Thus in *O'Brien v. Saxon (h)*, the replication was not double, as it only put in issue whether the defendant had become bankrupt. So in *Carr v. Hinchcliff (i)*, the plea merely constituted the defence of payment or satisfaction of the plaintiff's demand. And in *Isaac v. Farrar (k)*, the plea was, in effect, that the plaintiff was not a bonâ fide holder for value. An instance of duplicity in pleading is given in *Stephens on Pleading*, p. 282, 4th ed. in the case of *Humphreys v. Churchman (l)*, and the reason against it there stated, namely, that it leads to a double issue; and other instances of duplicity may be found in *Bro. Abr.* fol. 90, tit. "*Double Plea*;" and in *Smith v. Dixon (m)*, differing little in principle from the present. In *Griffin v. Yates (n)*, the Court held a replication bad which traversed

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| (a) 2 Bing. N. C. 473; See | 1 G. & D. 693. |
| S. C. 2 Scott, 703. | (h) 2 B. & C. 908; See S. C. |
| (b) 12 A. & E. 715; See S. C. | 4 D. & R. 579. |
| 4 P. & D. 345; 9 Dowl. 511. | (i) 4 B. & C. 553; See S. C. |
| (c) 6 A. & E. 482; See S. C. | 7 D. & R. 42. |
| 1 N. & P. 671. | (k) 1 M. & W. 65; See S. C. |
| (d) 3 B. & Ad. 2; See S. C. in | 4 Dowl. 750. |
| error, 1 Cr. & M. 500; 3 M. & | (l) Ca. temp. Hardw. 289. |
| Scott, 280. | (m) 7 A. & E. 1; See S. C. |
| (e) 8 Rep. 66, b. | 2 N. & P. 1; 6 Dowl. 47. |
| (f) 1 Q. B. 197; See S. C. | (n) 2 Bing. N. C. 579; See |
| 1 G. & D. 682; 9 Dowl. 517. | S. C. 2 Scott, 844; 4 Dowl. 647. |
| (g) 1 Q. B. 209; See S. C. | |

several facts, but suggested that *de injuriâ* might be pleaded. If the Court should hold that, in the present case, the replication is not double, it will be difficult to say in what case a pleading can ever be held bad for duplicity. It traverses two distinct facts, either of which would be a sufficient answer to the plea. It denies the fact of Douglas, Anderson & Co., being intrusted with the dock warrants, and also the fact of their agreeing to pledge the bales of silk described in those dock warrants. [*Tindal*, C. J.—The difficulty is to apply the rule. Here the defence is, that this was a rightful pledge; which involves two points; the right to pledge, and the pledging.]

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Sir *T. Wilde*, Serjt., *contra*. This plea arises out of the New Rules, and places the plaintiff in a new situation. The general issue, which no doubt the defendant would otherwise have pleaded, would have compelled him to have proved all the facts. The object of the New Rules was not to diminish the proof of each plea, but to limit the number of defences; and whatever the defendant ought to have proved under this head of plea, before the New Rules, he ought to prove now. The absence of any alteration with regard to replications shews this. The test applied by the other side to prove this replication bad, because a negative of either of the facts alleged, would defeat the plea, is erroneous. The true test is, where one head of defence comprises several facts, and in order to make out the defence, it is necessary to prove each of these facts, there the several facts may be traversed in the replication without duplicity. To make a replication double, two answers should be given to the same point of defence. An attempt has been made to draw a distinction between the present case, and some of those which have been cited, in which similar replications have been held good; but on examination, they will be found to be identical in principle. In the present case the defence is *lien*, and although two or three facts may be necessary to shew the existence of *lien*, it is but one point of defence after all. So in *Robinson v.*

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Rayley (a), there were three separate propositions all constituting the one distinct point of defence which the defendant set up; namely, that the cattle were the defendant's; that they were levant and couchant upon the premises; and that they were commonable cattle: and upon demurrer, Lord *Mansfield* held, that they constituted, in fact, but one single point of defence; namely, that the cattle were entitled to common; and, therefore, that a replication traversing them was not double. The authority of the case of *Robinson v. Rayley* has never been impugned, but on the contrary, has been corroborated by each succeeding case: *Rowles v. Lusty* (b), *Selby v. Bardons* (c), *Bardons v. Selby* (d), *O'Brien v. Saxon* (e), *Purchell v. Salter* (f), *Salter v. Purchell* (g), *Pigeon v. Osborn* (h), *Bell v. Tuckett* (i), *Bennison v. Thelwell* (j), *Griffin v. Yates* (k), (where the Court merely suggested that *de injuriâ* was the better form:) *Wilkins v. Boutcher* (l), *Eden v. Turtle* (m), *Scott v. Chappelow* (n), *Webb v. Weatherby* (o), *Palmer v. Gooden* (p), *Brogden v. Marriott* (q). Several of the above cases are to be found in the note to *Crogate's case*, in 1 *Smith's Leading Cases*, p. 55, where the authorities are brought together. *Garten v. Robinson* (r) shews, that where a party may reply *de injuriâ*, he is not bound to do so, and may traverse specially the material averments in the plea. The decisions in *Regil v. Green* (s), *Humphreys v.*

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| (a) 1 Burr. 316. | S. C. 4 Scott, N. R. 425; 3 M. & G. 807. |
| (b) 4 Bing. 428; See S. C. 1 M. & P. 102. | (m) 2 Dowl. 459, N. S.; See S. C. 10 M. & W. 635. |
| (c) 3 B. & Ad. 2. | (n) 5 Scott, N. R. 148; See S. C. 2 Dowl. 78, N. S., 4 M. & G. 336. |
| (d) 1 Cr. & M. 500. | (o) 1 Bing. N. C. 502; See S. C. 1 Scott, 477. |
| (e) 2 B. & C. 908; See S. C. 4 D. & R. 579. | (p) 7 M. & W. 486; See S. C. 9 Dowl. 248; In error, 8 M. & W. 890; 1 Dowl. 673, N. S. |
| (f) 1 Q. B. 197. | (q) 2 Bing. N. C. 473; See S. C. 2 Scott, 703. |
| (g) Id. 209. | (r) 2 Dowl. 41, N. S. |
| (h) 12 A. & E. 715. | (s) 1 M. & W. 328. |
| (i) 4 Scott, N. R. 402; S. C. 3 M. & G. 785. | |
| (j) 7 M. & W. 512; See S. C. 9 Dowl. 739. | |
| (k) 2 Bing. N. C. 579. | |
| (l) 1 Dowl. 478, N. S.; See | |

Churchman (a), Smith v. Dixon (b), Myn v. Cole (c), and Moore v. Bolcott (d), are all consistent with the view here taken. It may be that the replication of *de injuriâ* would be the proper form in the present instance, if it did not come within one of the exceptions in *Crogate's case (e)*; but as it does, it is submitted that the plaintiff is at liberty to traverse specially the entire proposition.

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Shee, Serjt., in reply.

Cur. adv. vult.

TINDAL, C. J., afterwards delivered the judgment of the Court (*f*).—This was an action of trover, to which the defendant has pleaded various pleas, and the plaintiff having replied, the defendant has demurred to the replications to the third, fourth, fifth, sixth, and seventh pleas.

As the same question arises upon each of the replications, it is sufficient to advert to the third plea and the replication thereto. That replication is objected to on the ground that it is double, and puts in issue two separate and independent facts, either of which, it is contended, is separately traversable, and affords a complete answer to the plea; namely, the fact of Douglas, Anderson & Co., being intrusted with the dock warrants mentioned in the plea, and also the fact of their agreeing to pledge the bales of silk described in those dock warrants. As a general proposition it cannot be denied, that a number of facts may be so connected together as to form but one point of defence, so as to admit of their being all put in issue in one and the same traverse; a familiar illustration of which rule occurs where assignees of a bankrupt sue in trover, and the plaintiffs allege they were possessed as assignees; the defendant may plead that the plaintiffs were not possessed as assignees, and thereby

(a) Ca. temp. Hardw. 289.

(b) 7 A. & E. 1; See S. C. 2 N.

& P. 1; 6 Dowl. 47.

(c) Cro. Jac. 87.

(d) 3 Dowl. 145; 1 Scott, 122;

1 Bing. N. C. 323.

(e) 8 Rep. 66, b.

(f) In Trinity Vacation.

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put in issue the whole of that complicated chain of facts which go to constitute a valid title as assignees. The difficulty, however, arises, not in laying down the rule, which is well established, but in the application of it to each particular case. It is frequently a matter of difficulty to say, whether several facts which go towards the constituting a defence, are so connected together as to form one complete point of defence, so as to admit of their being joined in one traverse; or whether the several facts together constituting a defence, are so disconnected, that the opposite party is bound to select one single insulated fact, and traverse it, and thereby to admit all the rest. In the case of *Robinson v. Rayley* (a), which is a leading case on this subject, the defendant to an action of trespass quare clausum fregit, appears to have pleaded a prescriptive right of common, and that he put his cattle into the locus in quo, being his own commonable cattle levant and couchant. The plaintiff traversed that they were his own commonable cattle levant and couchant, and the Court held, that this whole complex proposition was capable of being joined in one traverse. This case has been followed by many others which were cited in argument, namely, *Bennison v. Thelwell* (b), *Purchell v. Salter* (c), *Pigeon v. Osborn* (d), *Bell v. Tuckett* (e). It is not necessary to examine these cases in detail, because the principle on which they proceeded was not disputed, but only the application of that principle to the present case. The plea in this case alleges, that Douglas, Anderson & Co., were intrusted by the plaintiffs with certain dock warrants for the delivery of four bales of silk therein described, and had applied to the defendant for an advance of money upon the pledge of the said four bales of silk; and that it was agreed between the defendant and Douglas, Anderson & Co., that they should pledge with the defendant the said four bales of silk as a security for the money. The plea further

(a) 1 Burr. 316.

(b) 7 M. & W. 512.

(c) 1 Q. B. 197.

(d) 4 P. & D. 345

(e) 4 Scott, N. R. 402.

alleges the delivery of the dock warrants, the pledging of the said bales of silk, and an advance of money thereupon, and so justifies the detaining of the goods.

The question is, whether the two allegations in the plea; namely, that Douglas, Anderson & Co., were intrusted with the dock warrants mentioned in the plea; and that they agreed to pledge the silk mentioned in these dock warrants with the defendant; constitute one point of defence: or whether the plea consists of two separate and independent allegations, each of which, if traversed separately, is an answer to such plea. And we think these allegations in the plea are of the latter description. They are allegations of facts independent of each other. The denial that the factors were intrusted with the dock warrants is a complete answer to the plea, and, if found for the plaintiff, would entitle him to the verdict: again, the denial that they agreed to pledge the silks with the defendant, is a complete answer to the plea, and, if found for the plaintiff, entitles him to the verdict. In *Robinson v. Rayley*, when the defendant alleges that the cattle he turned on to the locus in quo were his own commonable cattle levant and couchant, he is giving a description of the same identical cattle; and the replication only denies the truth of his entire description of the same cattle. But, in the present case, the defence consists of two separate facts occurring at different times,—the intrusting to the factors by the plaintiff at one time, the agreement to pledge between the factors and the defendant at another;—each of these facts independent of the other, and having no necessary connexion. The present case resembles very nearly that of *De Wolf v. Bevan (a)*, determined by the Court of Exchequer in the last Term.

For the reason above given, we think the replications are too large, and ought not to be allowed: but we think it not unreasonable, where the question is one of considerable

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(a) *Post*, p. 345.

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nicety, that the plaintiff should be at liberty to amend his replication, upon payment of costs, if he shall be so advised, and to take issue on either of the separate allegations in the plea.

Rule accordingly.

MARTIN v. GRANGER.

The affidavit in support of a motion to set aside process served in a wrong county, stated that the process had been served more than two hundred yards from the boundaries of the proper county: *Held*, sufficient, without adding that there was no dispute as to boundaries.

A RULE had been obtained by *Channell*, Serjt., calling upon the plaintiff to shew cause why the copy of the writ of summons issued in this action should not be set aside for irregularity. The affidavit upon which the rule was granted, stated that the defendant had been served at Garraway's Coffee House, in the City of London, being a place more than two hundred yards from the boundaries of the county of Middlesex, with a copy of a writ of summons issued into that county.

Dowling, Serjt., shewed cause. The affidavit is insufficient. It ought to have stated the place to have been more than two hundred yards from the boundaries, and also that there was no dispute as to boundaries; *Webber v. Manning* (a). [*Maule*, J.—When the place is near the boundaries of another county, it may be necessary to swear that there is no dispute about them; but surely there can be no occasion for such an allegation when the defendant positively swears that the place is more than two hundred yards from the boundaries of the proper county. *Tindal*, C. J.—The argument would be the same, if the place were five miles off.]

Channell, Serjt., contra. Where the party making the affidavit, merely states his belief that the place is more than two hundred yards from the boundaries, he ought to

(a) 1 Dowl. 24.

add that there is no dispute about the boundaries; otherwise he might be stating his belief on a disputed point. Here, however, he swears positively that Garraway's Coffee House is more than two hundred yards from the boundaries of the county of Middlesex; *Harrison v. Wray* (a).

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PER CURIAM.

Rule absolute.

(a) *Ante*, vol. 1, p. 366; See S. C. 11 M. & W. 815.

In re THOMAS HARE.

TALFOURD, Serjt., moved that the order for taxing the attorney's bill herein, on which the Master's certificate was indorsed, should be made a rule of Court, under the 43rd section of 6 & 7 Vict. c. 73 (a), the bill having been taxed and the amount ascertained by the Master, in pursuance of that section. The difficulty in the present case is, whether the affidavit is properly entitled. It is entitled, "*In re Thomas Hare, gent., one, &c., and William Grant*;" the name of the client, Mr. Grant, being added to that of

An affidavit in support of a motion to make the order for taxing an attorney's bill on which the Master's certificate is indorsed, a rule of Court, under the 6 & 7 Vict. c. 73, s. 43, with a view to enforce the payment of the amount, should be entitled in the matter of the attorney, and not of the client as well as of the attorney.

(a) Section 43, "That all applications made under this Act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, shall be made in the matter of such attorney or solicitor; and that upon the taxation and settlement of any such bill the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of Court,) be final and conclusive as to the amount thereof, and payment of

the amount certified to be due and directed to be paid may be enforced according to the course of the Court in which such reference shall be made; and in case such reference shall be made in any Court of common law, it shall be lawful for such Court or any Judge thereof to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such Court or Judge shall deem proper."

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the attorney, Mr. Hare. The commencement of the 43rd section indeed, directs, that "all applications made under this act, to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivery up of deeds, documents, and papers, shall be made in the matter of such attorney or solicitor," &c. And accordingly the original motion to refer this bill for taxation, was so entitled, "*In re Thomas Hare, gent., one, &c.*" But the present is not an application by the client to refer, &c., or for the delivery of a bill or documents; but it is a motion by the attorney against the client to compel the payment of his bill as taxed by the Master; and, therefore, it is submitted, is properly entitled in the matter of the client, as well as in the matter of the attorney.

TINDAL, C. J.—Under the order to refer the bill for taxation, the Master's certificate, which it is now sought to enforce, was obtained. The present application should, therefore, be similarly entitled. Otherwise there will be a manifest discrepancy between this and the former proceedings. A fresh affidavit, properly entitled, had better be made, and the motion renewed.

Rule refused.

STEAD v. CAREY.

Defendant being under terms to plead issuably, delivered with his pleas a rule to reply, and the plaintiff obtained a week's time to reply, at the end of which, instead of replying, he signed judgment, on the ground that one of the pleas was not issuable: Held, that the plaintiff had waived the objection to the plea, by obtaining time to reply.

SHEE, Serjt., shewed cause against a rule which had been obtained to set aside the judgment signed in this cause for irregularity, with costs. The action was brought for the infringement of a patent granted "for making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks." On the 6th of May, the defendant, who was under terms to plead issuably, pleaded inter alia, that no company had

been obtained to set aside the judgment signed in this cause for irregularity, with costs. The action was brought for the infringement of a patent granted "for making or paving public streets and highways, and public and private roads, courts, and bridges, with timber or wooden blocks." On the 6th of May, the defendant, who was under terms to plead issuably, pleaded inter alia, that no company had

been formed pursuant to the provisions of the act 4 & 5 Vict. c. 91, (local and personal, public,) and that, therefore, the patent had become void. The defendant, at the time when he delivered the pleas, ruled the plaintiff to reply. The plaintiff took out a summons, which was not attended, for leave to sign judgment, and also for time to reply. Afterwards he took out a second summons, and obtained an order for seven days' time to reply; but no notice was then taken of the summons for leave to sign judgment. On the last day of the week given to reply, the plaintiff, instead of replying, signed judgment, on the ground that the plea above mentioned was not issuable.

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Shee, Serjt., now contended that the plea being frivolous, the plaintiff was at liberty to sign judgment, inasmuch as he had not taken any step in the cause by which the irregularity had been waived. He referred to an *Anonymous case* (a), in which *Parke*, J. said, "Asking for time is an admission that the plaintiff is in a situation to go on; but I do not know that it is an admission that the step was regular."

Manning, Serjt., in support of the rule, cited *Trott v. Smith* (b), where the Court of Exchequer held, that obtaining time to reply is a waiver of an objection that a plea is not an issuable one, when the defendant has been under terms to plead issuably.

PER CURIAM.—*Trott v. Smith* is quite in point. If the plaintiff had not had the indulgence granted to him, he would have been bound to reply before the time when he signed judgment.

Rule absolute.

(a) 1 Dowl. 23.

(b) 9 M. & W. 765; See S. C. 2 Dowl. 278, N. S.

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DAVIES, Demandant, v. LOWNDES, Tenant.

A writ of right by journeys accounts sued out after the time allowed by stat. 3 & 4 Wm. 4, c. 27, s. 36, for suing out original writs of right, is a nullity; being a new writ, and not a continuance of a former one.

But the Court refused to set aside, on motion, a writ so issued, and the subsequent proceedings; the objection to the writ, &c., appearing on the record.

In an action on a writ of right, the Court will not allow the general mise to be pleaded in conjunction with other matters, under stat. 4 & 5 Anne, c. 16, s. 4.

AN application had been made to the Lord Chancellor, in this case, to quash, supersede, or set aside a writ of right by *journées accompts*, upon the ground that it had issued after the time allowed for bringing real actions by the stat. 3 & 4 Wm. 4, c. 27, s. 36. In Michaelmas Term, 1843, the Lord Chancellor refused to interfere, and the demandant subsequently delivered her count.

In the ensuing Hilary Term,

Sir *T. Wilde*, Serjt., obtained a rule, on the part of the tenant, calling upon the demandant to shew cause why the writ of grand cape, the sheriff's return thereto, the count delivered in the action, and all other proceedings in this Court, should not be set aside.

Talfourd, Serjt., on the part of the demandant, also obtained a rule, calling on the tenant to shew cause why an order of *Coltman*, J., allowing the tenant to plead the general mise, together with several special pleas, should not be rescinded, and why the general mise, or such special pleas, should not be struck out. The pleas allowed by the learned Judge, were, first, the general mise; secondly, a fine; thirdly, that the writ was brought after the 1st day of June, 1835; fourthly, that Thomas James Selby was not seised of the lands demanded within sixty years of the issuing of the writ; fifthly, that the tenant was not the heir to William Selby Lowndes, deceased.

Cause was shewn against the former rule, (in Easter Term,) by

Talfourd, Serjt., and *E. V. Williams*, (*Willes* with them).

Sir *T. Wilde*, Serjt., *Kelly*, and *Gray*, (with whom was *F. Bayley*,) contra.

The following authorities were referred to; *Termes de la Ley*, tit. "*Journées Accompts*," *Spencer's case* (a), *Kinsey v. Heyward* (b), *Rastall's Entries*, tit. "*Brief*," 107, *Year Book*, 10 Edw. 3, fol. 16, a, *Year Book*, 8 Hen. 5, fol. 6, a, *Com. Dig.* tit. "*Abatement*," (P), *Bac. Abr.* tit. "*Abatement*," (M), *Gainsford v. Griffith* (c), *Booth on Real Actions* (d), *Willcox v. Huggins* (e), *Foot v. Sheriff* (f), *Leigh v. Leigh* (g), *Dumsday v. Hughes* (h), *Adam v. The Inhabitants of the City of Bristol* (i), *Brook's Reading on the Statute of Limitations* (k), *Vin. Abr.* tit. "*Journeys Accounts*," (B), pl. 11, *Walthall v. Aldrich* (l), *Elstob v. Thorowgood* (m), *Brickhead v. The Archbishop of York* (n), *Doe dem. Gilbert v. Ross* (o), *Bradley v. Warburg* (p).

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Cause was shewn against the second rule in the present Term, by *Gray*.

Talfourd, Serjt., and *E. V. Williams*, (*Willes* was with them,) contra.

Reference was made to the following authorities: *Tidd's Practice* (q), *Anderson v. Anderson* (r), *Rex inter. Harding and Harding*, cited in *Com. Dig.* tit. "*Pleader*," (E 2), *Robins v. Crutchley* (s), *Hardman v. Clegg* (t), *Tissen v. Clarke* (u), *Galton v. Harvey* (v), *Com. Dig.* tit. "*Battle*," (A 2), *Dumsday v. Hughes*.

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| (a) 6 Rep. 9, b. | (k) pp. 154, 155. |
| (b) 1 Ld. Raym. 432; S. C. in error, 12 Mod. 568. | (l) Cro. Jac. 588. |
| (c) 1 Saund. 58, f. | (m) 1 Ld. Raym. 283. |
| (d) 2nd edit. (1811), note to p. 33. | (n) Hob. 197. |
| (e) Fitzgib. 170, 289; S. C. 2 Stra. 907. | (o) 7 M. & W. 102; See S. C. 8 Dowl. 389. |
| (f) 1 Myl. & Cr. 250. | (p) 11 M. & W. 452; See S. C. 2 Dowl. 1059, N. S. |
| (g) 2 Bing. N. C. 464; See S. C. 2 Scott, 666; 4 Dowl. 650. | (q) Vol. 1, p. 655. |
| (h) 3 Bing. N. C. 439; See S. C. 4 Scott, 209. | (r) 2 W. Bl. 1157. |
| (i) 2 A. & E. 389. | (s) 2 Wils. 118. |
| | (t) Holt, N. P. C. 671. |
| | (u) 3 Wils. 419. |
| | (v) 1 B. & P. 192. |

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The facts of the case, and the arguments of counsel, so far as they are material, sufficiently appear in the judgment of the Court.

Cur. adv. vult.

The judgment was delivered, in Trinity Vacation, by TINDAL, C. J.—Two rules have been obtained in this action upon a writ of right. The first by the tenant, calling upon the demandant to shew cause why the writ of grand cape, and the sheriff's return thereto, and also the count delivered in this action, and all other proceedings in this Court, should not be set aside. The second, on the part of the demandant, calling on the tenant to shew cause, why he should not elect between the first plea of the general mise and certain other pleas comprised in the rule to plead several matters; and why either the said first plea or such other pleas should not be struck out and set aside.

With respect to the first rule, which involves a question of far more importance than the other, the facts are, that a former writ of right was sued out on the 6th of December, 1832, by the present demandant and her late husband, (who died during the progress of that suit, and whose death was duly suggested on the record,) against William Selby Lowndes, Esq., the tenant of the tenements sought to be recovered; that, upon a trial at the Bar of the Court of Common Pleas, a verdict was found for the tenant, but upon a bill of exceptions to the ruling of that Court, the Court of Error awarded a venire de novo; that the cause was tried a second time at the Bar of the Court of Common Pleas, when a verdict was again found for the tenant, and a bill of exceptions again tendered to the ruling of the Court; but that, between the date of the second verdict and the argument on the second bill of exceptions, the said William Selby Lowndes, the sole tenant in the writ of right, died. After his death, namely, in Hilary Vacation, 1843, the demandant sued out a new writ against the heir, grounding her right to do so upon the doctrine of a writ purchased by

journeys accounts. The tenant shortly afterwards made an application to the Lord Chancellor to set aside the writ so issued, on the ground that, writs of right having been abolished from and after the 31st of December, 1834, by the statute, 3 & 4 Wm. 4, c. 27, no writ of right could now be issued under any circumstances; and, secondly, that the right of proceeding by journeys accounts did not hold in the case of the death of a *sole* tenant in the writ. The Lord Chancellor, after expressing an opinion, in terms which it is impossible to misunderstand, that the writ of journeys accounts was not maintainable by law upon the ground of the first objection, declined however to act upon that opinion by quashing or setting aside the writ, on the ground that the same objection might be raised upon the record in an ulterior stage of the proceedings, where it might become subject to the review of the ordinary tribunals of the law.

The same objections have been raised before us upon this application to set aside the count, and all the judicial process that has been issued in this Court; and, after hearing a learned argument in support of and against such application, we have come to the same conclusion as that adopted by the Lord Chancellor, and for the same reason; viz., that by analogy to the course of practice adopted in this and the other Courts of Westminster Hall, we ought not, upon a summary application, from which there can be no appeal, to decide upon a question which involves the final determination of the rights of the parties, where the very same question may be raised on the record, and thereby not only the judgment of this Court be obtained, but, if thought necessary, the judgment of the Court of ultimate appeal.

It is obvious that such is the case; for the count in the present action necessarily forms part of the record, and that count states on its face that the former writ against the late tenant was issued before the passing of the late statute 3 & 4 Wm. 4, c. 27; it also recites the count upon the

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former writ, whereby it appears that the demandant, Elizabeth Davies, alleged the seisin in Thomas James Selby, whose heir she states herself to be, "within sixty years next before the commencement of that suit;" it also sets forth all the subsequent proceedings in the former action, down to the giving of judgment upon the second writ of error, and then avers the death of the sole tenant in the former writ. The count then states, that, "by reason of the death of the said William Selby Lowndes, the said writ of right and the suit in that behalf became and was abated, and that thereupon by journeys accounts, that is to say, within fifteen days next after the giving the last-mentioned judgment by the said Court of Exchequer Chamber, she freshly brought this present suit whereon she now counts:" and the count, after setting forth verbatim the writ which was last issued, alleges the seisin in Thomas James Selby, deceased, whose heir she alleges herself to be, "within sixty years next before the commencement of the said suit wherein the said Thomas Davies and Elizabeth his wife were demandants, and whereof the present suit is a continuation by journeys accounts as aforesaid."

It is clear, therefore, that every objection which the tenant intends to raise against the validity of this second writ of right appears on the record itself; the power of suing out a writ by journeys accounts, where the former has abated by the death of the sole tenant; the power of suing out any writ of right by journeys accounts after the passing of the statute 3 & 4 Wm. 4, c. 27; and also the objection that the seisin of the ancestor from whom the demandant claims is not laid within sixty years next before the teste of the writ last sued out, but within sixty years next before the teste of the former writ. And it is equally clear that the tenant may either raise his objection to the proceedings, and call for the decision of the count thereupon, at the time of his pleading, by demurring to the count; or he may, at his own option, reserve the objection until after the trial has taken place upon the merits; at which time the objection to the writ,

if well founded, will be equally fatal to the proceedings as at the present time, on the principle that "*debile fundamentum fallit opus*."

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If this mode of deciding the question upon demurrer had not been open to the tenant; if he had not possessed the power of raising the question whether the writ was valid or not before a superior Court, except by previously incurring the expense of a new trial; we should have thought it our duty at once to have quashed the proceedings, and to declare the writ issued in this case by journeys accounts, a nullity. But, as the tenant has the opportunity of bringing the question at once before the Court, upon the record, as a simple question of law, we think he can have no right to complain, if we decline to proceed summarily, and if we think it right to leave the question open for discussion before the highest tribunal.

Such being the determination at which we have arrived, we nevertheless think it right to explain the ground upon which our judgment is founded, that, in the present state of the law, the writ by journeys accounts cannot be sued out; in order that the demandant may have the opportunity of determining for herself the expediency of incurring additional expense in a litigation which may turn out, even if favourable to herself on the merits, to be fruitless in the event.

The broad ground upon which we rest our opinion that the present writ by journeys accounts cannot be supported, is, the operation of the statute 3 & 4 Wm. 4, c. 27, s. 36. By that statute it is enacted that no writ of right, and no other action real or mixed (with certain exceptions named in the statute), shall be brought after the 31st of December, 1834. The words of the act are precise and peremptory; extending to and comprising all writs of right whatever, whether originally sued out, or sued out by journeys accounts, or, which is contended to be the case before us, sued out by continuance. The question, therefore, becomes this,—is the writ of right so newly sued out another and

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different writ from that which was first sued out? If it is so, the consequence necessarily follows, that it is not a writ allowed by the law; there is no such writ in existence, no office from which, and no officer by whom, such new writ can be issued. And that it is a new writ, is the language of all the books. If a writ abates without the default of the demandant or plaintiff, he may have a new writ by journeys accounts, viz. "per dietas computatas recenter tulit quoddam breve;" *Spencer's case* (a): and the expression is "a new writ," and "aliud breve." In *Termes de la Ley*, tit. "*Journeys Accounts*," cited by the demandant, it is said, he may purchase "a new writ." The demandant contends that it is not in substance a new writ, but a continuance of the old writ; whereas, as it appears to us, strictly and properly, it cannot be a continuance, for it is not issued until after the old writ has abated; and Lord *Coke*, in his report above referred to, calls it only "quodammodo a continuance."

The Statute of Limitations, 32 Hen. 8, c. 2, expressly gives the power of suing out such new writ in the case of the abatement of the former writ by death, as it expressly enacts (b) "that the demandant, if alive, or his next heir, may pursue his action within one year next after such action or suit abated, and shall enjoy all such advantage to make their titles within the said one year as the demandant in such writ, &c., should or might have had in the said former action or suit. From which it appears that the second suit is not a continuance of the first, but that the two suits, the former and the latter, are distinct. The statute 21 Jac. 1, c. 16, s. 4, makes a similar legislative provision for the plaintiff bringing a new action within one year next after the judgment for the plaintiff has been reversed by writ of error. And the entire silence of the statute now under consideration, when these exceptions are found in the former, leads to the conclusion that the common law cannot introduce such a provision in favour of the demandant; a

(a) 6 Rep. 9, b.

(b) Sect. 10.

conclusion to which the two cases referred to in *Brooke's* reading on the former statute (*a*), afford a strong corroboration; for in those cases, it was held, that, as the statute only made provision for a new writ, where the former suit abated by death, the demandant was not entitled to sue out such writ by journeys accounts, where the former had abated by any other cause, though without the default of the demandant. If, then, where the statute has made actual provision for a new writ in one case, viz., abatement by death, such provision cannot be extended to any other species of abatement, there can be no legal ground for qualifying the general words of the statute, 3 & 4 Wm. 4, by introducing an exception upon which the act is altogether silent.

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Without entering into the discussion whether the doctrine of journeys accounts applies to the case of abatement by the death of a sole tenant, which is the case now under consideration, we have arrived at the conclusion we have before stated; but, at the same time, for the reasons before given, we think the first rule must be discharged.

With respect to the second rule, the question is, whether the tenant's mise upon the mere right can be joined with other pleas which raise questions of fact for trial by an ordinary jury; and we think the two cannot be joined together. The mise is not properly a plea, but a defence of a peculiar kind, in which the tenant takes upon him to assert that he has a better title than the demandant. An inspection of the record set out at the end of the third volume of *Blackstone's Commentaries*, would shew, at once, how incongruous is the process for trial of the issue in the one case and in the other. The oath administered to the recognitors of the grand assize, is a different oath from that taken by the jury. The number of the recognitors is different. Many of the issues raised by the pleas are involved in the trial of the mere right: and if it is supposed

(a) pp. 154, 155.

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for a moment there should be a jury to try the issues, and that the mere right should be tried by the recognitors, great and inextricable confusion would arise if the jury found one way, and the recognitors another. No instance has been pointed out where this has been claimed and allowed as a matter of right. In the writ of right tried at Lancaster, which was referred to as an authority, it appears the issues in fact were tried by the recognitors, by consent; and we cannot but think the allowing such a practice by consent would be greatly inexpedient, and make any proceeding against witnesses very hazardous. We cannot, therefore, without any authority, introduce a new practice upon this occasion, which is not improbably the last writ of right that will be tried. We, therefore, think the second rule must be made absolute.

Rule to set aside the writ and other proceedings discharged, without costs.

Rule absolute for the tenant to elect, within a fortnight, between the general mise, and the special pleas contained in the rule to plead several matters.

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In an action on a policy of insurance, the declaration averred that the policy was made by J. & Co., as the

plaintiff's agents, and on his account, and for his benefit; and that J. & Co. received the order for and effected the policy as such agents: *Held*, on special demurrer, that a plea traversing this averment was bad, as amounting to the general issue.

The defendants pleaded, that the master of the vessel, on which that policy was effected, had not entered into an agreement in writing with the seamen, pursuant to the stat. 5 & 6 Wm. 4, c. 19, s. 2, wherefore the voyage was illegal: *Held*, on general demurrer, that the plea was ill, as the non-compliance with the statute by the master, did not make the voyage itself illegal, or the vessel unseaworthy.

ASSUMPSIT, on a time policy of insurance, effected upon a steamboat engaged in the coasting trade. The declaration averred that the plaintiff, by H. and J. Johnson & Co., the plaintiff's agents in that behalf, theretofore, to wit, &c.,

caused to be made a certain policy of insurance, purporting thereby that the said H. and J. Johnson & Co., as well in their own names, as for and in the name or names of all and every person and persons, to whom the same did, might, or should appertain in part or in all, did make assurance, and cause themselves and them, and every of them, to be assured with and by the defendants, lost or not lost, for the space of twelve calendar months. The declaration, after setting out the policy in the usual form, then proceeded to allege that the said policy of insurance was so made by the said H. and J. Johnson & Co. as aforesaid, as the agents of the plaintiff, and on his account, and for the plaintiff's use and benefit, and that the said H. and J. Johnson & Co., did receive the order for, and effect the said policy of insurance, as such agents as aforesaid; of all which premises the defendants afterwards had notice. And thereupon, afterwards, to wit, &c., in consideration that the plaintiff, at the request of the defendants, had then paid to the defendants a certain sum of money, to wit, the sum of 157*l.* 10*s.*, as a premium or reward for the insurance of 3000*l.* of and upon the premises in the said policy of insurance mentioned, and had then promised the defendants to perform and fulfil all things in the said policy of insurance contained on the part and behalf of the insured to be performed and fulfilled: the defendants then promised the plaintiff that they would become and be insurers to the plaintiff of the sum of 3000*l.* upon the said premises in the said policy of insurance mentioned; and would perform and fulfil all things in the said policy of insurance mentioned on their part and behalf, as such insurers of the said sum of 3000*l.*, to be performed, fulfilled, and observed: and the defendants then became and were insurers to the plaintiff, and then duly subscribed the said policy of insurance as such insurers of the said sum of 3000*l.*, upon the said premises in the said policy in that behalf mentioned. The declaration then stated that the plaintiff, at the time of the making of the said policy of insurance, was, and from thence continually afterwards,

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until and at the time of the loss thereafter mentioned, continued to be, interested in the said ship in the said policy of insurance mentioned, to a large amount, to wit, to the amount of all the moneys by him ever insured, or caused to be insured thereon. The declaration then averred the total loss of the steamboat, &c.

Second plea. That the said policy of insurance was not made by the said H. and J. Johnson & Co., as agents for the plaintiff, or on his account, or for his use and benefit; and that the said H. and J. Johnson & Co. did not receive the order for, or effect the said policy of insurance, as such agents as aforesaid. Conclusion to the country.

Sixth plea. That the said policy of assurance was made and that the said loss of the said ship or vessel happened after the passing of a certain Act of Parliament made and passed in the session of Parliament held in the 5th and 6th years of the reign of his late Majesty, king William the Fourth, intituled, "An Act to amend and consolidate the laws relating to merchant seamen of the United Kingdom; and for forming and maintaining a register of all the men engaged in that service." And the defendants further say, that the said ship or vessel was, at the several times of sailing on the said voyage, and of the said loss in the declaration mentioned respectively, a British registered ship of the burthen of eighty tons and upwards; and that the crew of the said vessel then consisted of divers, to wit, twenty seamen, and twenty other persons, (not being apprentices,) and of one master, to wit, one Robert Morris Hunt; and the defendants further say, that there was not, at the time of the sailing of the said ship or vessel on the said voyage in the declaration mentioned, or at any other time before or after, any agreement in writing with the said master, and the said seamen and other persons, or any or either of them, specifying what monthly or other wages each of such seamen and other persons, being part of the said crew, or any or either of them, was to be paid, the capacity in which he was to act, or the nature of the voyage

in which the said ship was intended to be employed; contrary to the form of the statute made and provided in that behalf: wherefore the defendants say, that the said voyage was wholly illegal. Verification.

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Special demurrer to the second plea, alleging as causes of demurrer, that the plea amounted to non-assumpsit; that all the matters traversed in the plea, might be given in evidence under the issue joined on the plea of non-assumpsit; and that it contained a negative pregnant, being pregnant with doubt, whether the defendants, by their said second plea, meant to say, that the said policy of insurance was not made at all; or whether the defendants only meant to say, that the said policy of insurance was not made by the said H. and J. Johnson & Co., as the agents for the plaintiff, or on his account, or for the plaintiff's use and benefit.

To the sixth plea, there was a general demurrer; the causes of demurrer assigned in the margin being, that the plea was defective in substance, as it alleged no facts which would constitute such illegality in the voyage, as to render the policy void; and also, inasmuch as by the statute, 5 & 6 Wm. 4, c. 19, the agreement required to be entered into with seamen before any voyage, is to be entered into with them by the master of any ship or vessel, and the penalty for default is inflicted on the master; and that the owner of any ship or vessel, not having knowledge of the master's default, cannot be prejudiced thereby, so as to prevent his recovering on a policy effected on such ship.

Joinder in demurrer.

Channell, Serjt., to support the demurrers. The second plea amounts to the general issue. *Sutherland v. Pratt* (a) is precisely in point. There, to a declaration on a policy of insurance, the defendants pleaded that the policy was not caused to be made by or on the behalf of the plaintiffs: and the Court held it to be a bad plea, as amounting to a plea

(a) 2 Dowl. 813, N. S.; See S. C. 11 M. & W. 296.

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of non-assumpsit. This plea is also bad on another ground, as containing a negative pregnant. With respect to the sixth plea, it raises a defence founded on the statute 5 & 6 Wm. 4, c. 19, the title of which is set out in the plea. The second section enacts, "That it shall not be lawful for any master of any ship or vessel belonging to any subject of His Majesty of this United Kingdom trading to parts beyond the seas, or of any British registered ship of the burthen of eighty tons or upwards, employed in any of the fisheries of the United Kingdom, or in trading coastwise or otherwise, to carry to sea on any voyage, either from this Kingdom or from any other place, any seaman or other person as one of his crew or complement, (apprentices excepted), without first entering into an agreement in writing with every such seaman, specifying what monthly or other wages each such seaman is to be paid, the capacity in which he is to act, and the nature of the voyage in which the ship is intended to be employed, so that the seaman may have some means of judging of the probable period for which he is likely to be engaged; and the said agreement shall contain the day of the month and year in which the same shall be made, and shall be signed by the master in the first instance, and by the seaman respectively, at the port or place where such seaman shall be respectively shipped; and the master shall cause the same to be, by or in the presence of the party who is to attest their respective signatures thereto, truly and distinctly read over to every such seaman before he shall be required to sign the same, in order that he may be enabled to understand the purport and meaning of the engagement he enters into, and the terms to which he is bound." The vessel insured being a coasting vessel, of upwards of eighty tons burthen, the point raised by the defendants is, that there has been such a contravention of the statute as to disentitle the owner to sue on this policy of insurance. It is submitted, on the part of the plaintiff, that the neglect of the master to sign the articles of agreement does not make the

contract void between the shipowner and the underwriters. If the master of the vessel had brought an action against a seaman for neglecting to do his duty, it might be an answer to say that no articles had been signed between them; but that is a very different case from the present. There is no pretence here for saying that the contract for the voyage was illegal, as might have been objected in *Suart v. Powell* (a), which will probably be cited for the defendant. The present case is distinguishable from *Law v. Hodson* (b), *Bensley v. Bignold* (c), *Little v. Poole* (d), and *Forster v. Taylor* (e), upon the ground that in those cases the contract itself was prohibited; but here the statute does not prohibit the voyage. In *Wetherell v. Jones* (f), Lord *Tenterden*, delivering the judgment of the Court, observes: "Where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, in the performance of something to be done on his part." In the present case the law has been infringed by a third party, and therefore the plaintiff is in a still better situation than that referred to by Lord *Tenterden*. *Cope v. Rowlands* (g) is an authority to the same effect. There, *Parke, B.*, says (h): "If the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?"

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Byles, Serjt., contra. The second plea is good. It is founded on the stat. 28 Geo. 3, c. 56, which enacts, that it shall not be lawful for any person to effect any policy of insurance upon any ship or goods, without first inserting in such policy, the name or names, or the usual style and firm

(a) 1 B. & Ad. 266.

(b) 11 East, 300.

(c) 5 B. & A. 335.

(d) 9 B. & C. 192.

(e) 5 B. & Ad. 887; See S. C.

3 N. & M. 244.

(f) 3 B. & Ad. 226.

(g) 2 M. & W. 149.

(h) Ibid, p. 157.

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of dealing of one or more of the persons interested, or of the person or persons residing in Great Britain, who shall receive the order and effect such policy. The name of the plaintiff does not appear in this policy, but only the names of the agents. It was necessary, therefore, that the declaration should contain an averment that Johnson & Co. insured for the plaintiff's benefit, and the defendants could not put that allegation in issue by the plea of non-assumpsit. The case comes within the third rule of the Reg. Gen., Hil., 4 Wm. 4, "Assumpsit." Under the issue in *Sutherland v. Pratt* (a), or under the general issue, a subsequent ratification would have been sufficient to constitute the party who effected the policy, the agent; but it would not be sufficient under the present plea. Then, secondly, the plea does not amount to a negative pregnant; *Bell v. Tuckett* (b); *Michael v. Myers* (c). With regard to the sixth plea, it is submitted that the facts, which the demurrer admits, disclose an illegal voyage. It was conceded in *Suart v. Powell* (d), that a non-compliance with the Navigation Act would render a voyage illegal, and if the voyage be illegal, a policy to insure the ship, which is to perform the voyage, must be illegal also. The statute 5 & 6 Wm. 4, c. 19, requires certain things to be done with a view to the public benefit, and a non-compliance with its requisitions is a public detriment. In *Law v. Hollingsworth* (e) an underwriter was held to be discharged from a policy of insurance, because the terms of having a pilot on board, prescribed by the 5 Geo. 2, c. 20, had not been complied with. That case was recognised as an authority by *Tindal*, C. J., in *Sadler v. Dixon* (f), on the ground of an implied warranty to observe the positive requisitions of an act of Parliament. But further, the plea amounts to an informal plea of unseaworthiness, which is good on general demurrer. Unless the crew and captain

(a) 2 Dowl. 813, N. S.
 (b) 3 M. & G. 785; See S. C.
 4 Scott, N. R. 402; 1 Dowl. 458,
 N. S.
 (c) *Ante*, vol. 1, 792; See S. C.

7 Scott, N. R. 444.
 (d) 1 B. & Ad. 266.
 (e) 7 T. R. 160.
 (f) 8 M. & W. 900.

are competent for the voyage, the vessel is not seaworthy; *Clifford v. Hunter* (a), *Tait v. Levi* (b), *Hollingworth v. Brodrick* (c). There is an implied warranty on the part of those who sign the policy, that they will comply with the provisions of the act of Parliament, and prevent desertion among the crew, by signing proper articles of agreement.

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Channell, Serjt., replied.

TINDAL, C. J.—The defendants in this case have pleaded, amongst others, two pleas, which have been demurred to by the plaintiff. One of these pleas puts in issue an averment in the declaration, “that the policy of insurance was made by H. and J. Johnson & Co., as the agents for the plaintiff, and on his account, and for the plaintiff’s use and benefit; and that the said H. and J. Johnson & Co., did receive the order for, and effect the said policy of insurance, as such agents as aforesaid.” The plaintiff has demurred to that plea on the ground that it amounts to the general issue, since all the matters traversed therein might be given in evidence under non-assumpsit; and I am of opinion, that this objection is well founded. There can be no doubt, that the promise itself, and the consideration alleged, are put in issue by the plea of non-assumpsit. What we have to see, therefore, is, what the consideration is alleged to be, and whether the consideration, as alleged, is traversed or not. The declaration begins by stating that the plaintiff, by certain persons called or known by the name, style, and firm of H. and J. Johnson & Co., the plaintiff’s agents in that behalf, caused to be made a certain policy of insurance, and that the said policy of insurance was so made by the said H. and J. Johnson & Co., as the agents for the plaintiff, and on his account, and for his use and benefit; and that the said H. and J. Johnson & Co., did receive the order and effect the said policy of insurance as such agents. It appears, therefore,

(a) M. & M. 103.

(b) 14 East, 481.

(c) 7 A. & E. 40; See S. C. 2 N. & P. 608.

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on the face of this declaration that the policy was effected in the names of H. and J. Johnson & Co., as the agents of the plaintiff; and the policy itself, which it set out in the declaration, purports to be made not only in the names of Johnson & Co., but in the names of the persons interested therein. Now, when we come to the consideration for the mutual promises, the declaration runs thus: "in consideration that the plaintiff, at the request of the defendants, had paid to them the sum of 157*l.* 10*s.* as premium, and had promised the defendants to perform and fulfil all things on the part of the insured to be performed and fulfilled, the defendants promised that they would perform all things on their part to be performed, as insurers of the sum of 3000*l.*" Upon a plea of non-assumpsit to this declaration, the plaintiff would be called upon to shew by evidence that Johnson & Co., in their own names, made such an insurance as that alleged, and that they did so as his agents; which is the same issue as that which is made the subject of traverse in this plea. I do not agree with what has been said at the Bar, that it would be necessary, under this traverse, to shew that Johnson & Co. were the plaintiff's agents at the very time when the policy was effected; whereas, under a plea of non-assumpsit, a subsequent ratification of the agency would be sufficient. I cannot see any distinction between the two cases; if ratification were sufficient in one instance, it would be also in the other. It therefore seems to me that the first ground of objection which has been taken is good, and that the demurrer to the second plea must be allowed to prevail. On the part of the plaintiff, the case of *Sutherland v. Pratt* (a) was cited, and it appears to me to be an authority quite in point. With regard to the sixth plea, the defendants allege as an answer to this action, that the policy was effected on an illegal voyage, owing to a non-compliance with the provisions of the stat. 5 & 6 Wm. 4, c. 19. There can be no doubt that a policy on an illegal voyage is void,

(a) 2 Dowl. 813, N. S.; See S. C. 11 M. & W. 296.

and cannot be enforced; for it would be singular, if, when the contract for the voyage itself is void, a collateral contract for indemnity on the voyage should not be void also. Where therefore, the voyage is illegal, the contract for a policy of insurance follows the fate of the contract for the voyage. There are a great many cases in which policies could not be enforced, because the voyage which may be undertaken, would be illegal. Thus any policy upon a voyage contravening the provisions of the Convoy Act, in time of war, or those statutes which govern the East India or South Sea Companies, or the General Navigation Act, would be void; because these acts have reference to matters of general public policy. It appears to me, however, that the provisions of the present act were made for a collateral purpose only, and therefore the policy in question is completely removed from the objection of illegality. The object of the act seems to be to give a readier mode to seamen of enforcing agreements with the masters of vessels, and to prevent their being imposed upon. It enacts, therefore, that it shall not be lawful for any master to carry to sea any seamen without first entering into an agreement in writing; and the master is liable to a penalty in case of default. It appears to me, however, that a non-compliance with this regulation on the part of the master does not make the voyage itself illegal; but only furnishes occasion for a proceeding against the master. It was argued, in addition, that the plea was in effect a plea of unseaworthiness; but there is nothing in the plea to make out such a defence. There is nothing to shew that the crew was insufficient, or that the master was wanting in skill. Upon both pleas, therefore, I think that judgment ought to be given for the plaintiff.

COLTMAN, J.—With respect to the second plea, the question is, whether the defence which it sets up would be admissible under the plea of non-assumpsit, or whether it ought to be pleaded specially. This turns upon the new

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Pleading Rules, Reg. Gen., Hil., 4 Wm. 4, Rules 1 and 3, 'assumpsit.' The latter rule states that "all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." The question which arises upon that rule is, whether this plea is in the nature of a plea in confession and avoidance, or sets out matters making the transaction void or voidable on the ground of fraud or otherwise. It appears to me not to be a plea of either description. The allegation in the declaration is that Johnson & Co., the plaintiff's agents in that behalf, made the policy of insurance. Where there is no express contract by the party interested, but the contract is made through the intervention of an agent, the power of the agent to make that contract is necessarily involved, and is put in issue by non-assumpsit. As to the sixth plea, the question which arises is, whether the voyage is illegal, in consequence of the neglect of the captain to comply with the provisions of the act of Parliament. It is admitted that the contract of insurance was not illegal originally; but it is supposed that something occurred afterwards which rendered the voyage illegal, and consequently made the policy void. But does the act of Parliament make the voyage illegal, in consequence of the master's default? It is true that the second section of the statute prohibits the captain from taking on board any seaman whose name, &c. is not properly inserted in the ship's articles; and the argument for the defendants seems to go to this extent, that if there be one person on board who has not signed the articles, the voyage would be illegal, and the contract void. That seems to me a proposition of a very startling nature, and one which was not contemplated by the statute. If we look at the act, the object of it is pretty distinctly stated in the second section to be "in order that the seaman may be able to understand the purport and meaning of the engagement he enters into, and the

terms to which he is bound." The object, therefore, which the statute had in view, was not a matter of public regulation, affecting the interests of the kingdom or the public generally; but was simply intended to prevent seamen being imposed upon in respect either of the duration of the voyage, the services which they might be called upon to perform, or the remuneration which they were entitled to receive. For the purpose of enforcing this regulation various penalties are inflicted; and although this latter circumstance does not shew that there is to be no other remedy, it throws some light upon the intention of the statute. With regard to the other ground on which this policy has been attacked, viz. that the ship was rendered unseaworthy by the neglect of the master, in not having signed articles of agreement with some of the seamen, no case has been cited to shew that unseaworthiness embraces such a state of facts as that disclosed here. To make a ship unseaworthy, it would be sufficient that she had not a competent crew; but I can see nothing in the non-signature of the ship's articles which would prevent the crew from keeping the vessel afloat.

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Judgment for the Plaintiff.

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ASSUMPSIT. The declaration stated, that by a certain agreement and instrument in writing, made by the defendant, heretofore, to wit, &c., after reciting that P. M. Whitnall, The plaintiff declared upon an agreement by the defendant, which recited that an estate had been mortgaged by W., since deceased; that plaintiff had joined in a bond as a collateral security for the mortgage money, and had afterwards been compelled to pay off a portion of it; that defendant had taken upon himself the management of W.'s affairs, had repaid plaintiff part of the money which he had paid, and had agreed to pay him the residue out of the proceeds of the mortgaged property when sold, and in the meantime to appropriate the rents of the premises to the payment of the same sum as that for which plaintiff had a lien on the premises; that defendant had requested plaintiff to release and convey his interest to A. and H., and that he had done so, reserving to himself a lien on the property as aforesaid. The agreement then stated that, in consideration of plaintiff having paid the said money, and having released and conveyed all his interest to A. and H., reserving to himself the said lien, defendant undertook and agreed to repay him the remainder of the sum so paid by him: Held, on demurrer, that the declaration was bad, as it disclosed no consideration for defendant's promise.

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in his lifetime, released and assured by deeds of the 30th and 31st of May, 1832, his freehold dwelling-houses and hereditaments at W., unto R. R. and H. B., their heirs and assigns, by way of mortgage, to secure the repayment of 3500*l.*; after also reciting that the said R. R. and H. B., required the said P. M. Whitnall to obtain the plaintiff to join him in a bond, as a collateral security, to further secure the repayment of the said sum of 3500*l.* and interest; and also reciting that the defendant had, since the death of the said P. M. Whitnall, taken upon himself the management of the estate of the said P. M. Whitnall, and had paid to the said R. R. and H. B., the sum of 3370*l.*; and also reciting that R. R. and H. B. had called on the plaintiff for payment of the said mortgage, as he was surety for the said P. M. Whitnall in the said bond, and that the plaintiff paid R. R. and H. B. 130*l.* on the 1st of May, 1835; and also reciting that the defendant had repaid the plaintiff the sum of 48*l.*, leaving due to him the sum of 82*l.*, and that such last mentioned amount the defendant had agreed to repay to the plaintiff, out of the monies which might arise from the sale of the said hereditaments, when the same should be sold, and in the meantime to appropriate the rents of the said hereditaments towards payment of the said sum, as the plaintiff had a lien on the said hereditaments, for the said sum of 82*l.*; and also reciting, that the defendant had requested the plaintiff to release and convey all his estate and interest in the said hereditaments to Alison and Lenox, and which the plaintiff had already done, (reserving to himself a lien on the said property as aforesaid): it was, by the said agreement, or instrument in writing, witnessed, that in consideration of the plaintiff having paid to the said R. R. and H. B. the said sum of 130*l.*, in part discharge of the said mortgage, and in consideration of the plaintiff having released and conveyed all his estate and interest in the said hereditaments to Alison and Lenox, (reserving to himself the said lien); and in order to secure to the plaintiff the repayment of the said sum of 82*l.*; the defendant did thereby

undertake and agree with the plaintiff, his executors, administrators, and assigns, to repay to him or them the said sum of 82*l.*, with interest thereon, out of the proceeds to arise from the sale of the said hereditaments, when the same should be sold, and in the meantime, and until such sale was effected, to appropriate the rents of the said hereditaments in liquidation of the sum so due to the plaintiff. The declaration then, after stating the defendant's promise, in consideration of the premises, to perform the agreement, went on to allege that after the agreement was made, and before the said sale was effected, to wit, &c., and before the commencement of this suit, the defendant received the said rents in the agreement mentioned, to a large amount, to wit, &c., which he could, and might, and ought, according to the said agreement, to have appropriated in liquidation of, and which were sufficient to liquidate, the said sum of 82*l.* so due to the plaintiff. Breach, that the defendant would not, although often requested, &c., appropriate the said rents so received by him, or any part thereof, in liquidation of the said sum of 82*l.* so due to the plaintiff, or pay the same rents or any part thereof to the plaintiff, on account or in discharge, or part discharge, of that sum of money, or otherwise howsoever, but wholly refused so to do.

The defendant pleaded, *inter alia*, two special pleas, and demurred specially to the replication to those pleas; but as it was admitted by the counsel for the defendant that the pleas could not be supported, the arguments were directed entirely to the sufficiency of the declaration.

Dowling, Serjt., (in Easter Term) for the defendant. The declaration is bad, as it discloses no sufficient consideration for the promise alleged. The declaration states that the defendant promised, "in consideration of the premises," and it clearly appears that the only interest which the plaintiff had in the estate, was a lien on it in equity. To say, therefore, that he released all his interest,

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except his lien, is to say that he has released nothing. He cited *Copis v. Middleton* (a), and *Wilkinson v. Oliveira* (b). In the latter case it was held, that the mere giving of a letter to the defendant, whereby the defendant was enabled to determine certain controversies, and obtained a large portion of a third party's effects, was a sufficient consideration to sustain the promise alleged; but here the plaintiff assigned no interest whatever. Secondly, assuming that the declaration discloses any consideration, it is only a moral consideration, and the promise founded upon it is nudum pactum. The consideration being executed, the declaration would undoubtedly be bad, if it did not allege that the consideration moved at the request of the defendant; but it does not follow that the introduction of the words "that the defendant requested the plaintiff to release and convey," will make a defective consideration sufficient. Where the words "at the request of the defendant," have been held to sustain a subsequent promise, the consideration has been executory; *Lampleigh v. Braithwait* (c). In *Docket v. Voyel* (d), *Barker v. Halifax* (e), and *Jeremy v. Goochman* (f), the declaration alleged a past consideration; and in each of those cases, it was held, that the consideration did not support a subsequent promise. Even if the promise be express, an executed consideration will not support it: unless the express promise be one which the law itself will imply. Therefore, in the case of a barrister, or a physician, a promise to pay after the render of services, is nudum pactum, *Veitch v. Russell* (g). No promise arises by implication of law from the facts alleged upon this record. He referred to *Brown v. Crump* (h), *Granger v. Collins* (i),

(a) Turn. & Russ. 224.

(b) 1 Bing. N. C. 490; See S. C. 1 Scott, 461.

(c) Hob. 105; See S. C. Moore, 866. And see the note to this case, in 1 Smith's Leading Cases, p. 70.

(d) Cro. Eliz. 885; See S. C.

Moore, 643.

(e) Cro. Eliz. 741.

(f) Ibid. 442.

(g) 3 Q. B. 928; S. C. 3 G. & D. 198.

(h) 1 Marsh. 567.

(i) 6 M. & W. 458.

Hopkins v. Logan (a), *Jackson v. Cobbin* (b), *Roscorla v. Thomas* (c).

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Channell, Serjt., contra. The declaration is good. It may be conceded for the purposes of the argument, that a moral consideration would not be sufficient to support a promise; but here there is a sufficient legal consideration shewn. It is not competent to the defendant to say, that there was no interest released and conveyed by the plaintiff, inasmuch as he has signed an agreement, admitting that the plaintiff did release *some* interest in the mortgaged premises. There is certainly a difficulty in the words "reserving to himself the said lien;" but it is submitted, that either these words must be rejected as inconsistent with the preceding allegation, or they must receive such a construction as will make them consistent with it. The fair meaning of these words is, that although the plaintiff parted with all his interest in the property to Allison and Lepox, and had parted with his lien so far as they were concerned; he yet retained a lien as between himself and the defendant. There is, therefore, a sufficient legal consideration. In *Granger v. Collins*, and the other cases cited for the defendant, there was a limited liability arising from the relation to the parties, and the promise averred in the declaration was larger than that which the law would imply. As to the consideration being past in the present case, there has been a previous request, and, therefore, the consideration, although executed, will support a subsequent promise, *Osborne v. Rogers* (d), *Eustwood v. Kenyon* (e).

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court (f).

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| (a) 5 M. & W. 241; See S. C. | G. & D. 508. |
| 7 Dowl. 360. | (d) 1 Wms. Saund. 264. |
| (b) 8 M. & W. 790; See S. C. | (e) 11 A. & E. 438; See S. C. |
| 1 Dowl. 96, N. S. | 3 P. & D. 276. |
| (c) 3 Q. B. 234; See S. C. 2 | (f) In Trinity Vacation. |

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—This was a declaration in assumpsit upon a special agreement, to which the defendant pleaded, amongst others, two special pleas, namely, the fourth and fifth pleas, to which the plaintiff demurred; and the defendant demurred specially to the plaintiff's replication to the third plea. But it is unnecessary to advert to the particular state of the pleadings; as it was admitted by my brother *Dowling*, on the argument for the defendant, upon an objection taken to the fourth and fifth pleas, that he could not support the pleas; and the whole argument before us turned on the sufficiency of the declaration.

Two objections were made to the declaration. First, that it did not show any consideration for the promise made by the defendant. Secondly, that the promise was laid in respect of an executed consideration, but was not such a promise as would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although express, other than that which the law itself would have implied. The cases cited by the defendant, viz.: *Brown v. Crump* (a), *Granger v. Collins* (b), *Hopkins v. Logan* (c), *Jackson v. Cobbin* (d), and *Roscorla v. Thomas* (e), certainly support that proposition to this extent—that, where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But these cases may have proceeded upon the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and consequently any promise made afterwards must be nudum pactum, there remaining no consideration to support it. But the case may perhaps be different where there is a consideration from which no promise would be implied by law; that is, where the party suing has sustained a detriment to himself, or conferred a benefit to the defendant, at his

(a) 1 Marsh. 567.

(b) 6 M. & W. 458.

(c) 5 M. & W. 241.

(d) 8 M. & W. 790.

(e) 3 Q. B. 234.

request, under circumstances which would not raise any implied promise. In such cases it appears to have been held in some instances, that the act done at the request of the party charged, is a sufficient consideration to render binding a promise afterwards made by him in respect of the act so done. *Hunt v. Bate* (a), and several cases mentioned in the margin of the report of that case, seem to go to that extent: as also do some others collected in *Roll. Abr.*, tit. "*Action sur Case*"(Q). But it is not necessary that we should pronounce any opinion upon that point; for, assuming it to be sufficiently alleged that the plaintiff released and conveyed his interest at the request of the defendant, yet it does not appear that he had any interest which passed by such release and conveyance. The declaration is founded on an agreement which recites that a certain estate had been mortgaged by one Whitnall, since deceased; and that the plaintiff had joined in a bond as a collateral security for the mortgage money, and had afterwards been compelled to pay off a portion of it; that the defendant had taken upon himself the management of Whitnall's affairs, had repaid to the plaintiff part of the money which he had paid, and had agreed to pay him the residue out of the proceeds of the mortgaged property when sold, and in the meantime to appropriate the rents of the premises to the payment of the same sum as that for which the plaintiff had a lien on the said premises. Thus far there is nothing to shew that the plaintiff had any other interest than his lien. The agreement then recites that the defendant had requested the plaintiff so to release and convey his interest to Alison and Lenox, and that he had done so, reserving to himself a lien on the property as aforesaid, that is, reserving to himself the only interest that he is shewn to have had. The agreement then proceeds to state, that, in consideration of the plaintiff having paid the money, and having released and conveyed all his estate and interest to Alison and Lenox, reserving to himself the said

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lien, the defendant undertook and agreed, &c. Now, the payment of the money by the plaintiff would be no consideration for the defendant's promise; and the alleged release and conveyance was, again, no consideration; for it does not appear that the plaintiff parted with anything by it. For the plaintiff, it was contended, that he must be taken to have parted with his lien on the property, reserving only his right to call on the defendant to pay him out of the proceeds of the estate, when sold, and in the meantime to appropriate the rents to the same object; but we cannot put that construction on the agreement, which expressly speaks of the lien reserved as the same lien which the plaintiff had before. Such being, in our judgment, the effect of the agreement set out in the declaration, the case resembles that of *Edwards v. Baugh* (a). There the declaration alleged that certain disputes and controversies were pending between the plaintiff and the defendant, as to whether the defendant was indebted to the plaintiff in a certain sum of money, and thereupon, in consideration that the plaintiff would promise the defendant not to sue him for the recovery of the sum in dispute, and would accept a smaller sum in full satisfaction, the defendant promised to pay such smaller sum. On general demurrer, the declaration was held bad, because it did not allege that any debt was due from the defendant to the plaintiff, or that any action had been commenced for the recovery of any sum claimed. So in the present case, as the declaration does not shew that the plaintiff had any interest in the premises, except that which he reserved, it does not appear that his release and conveyance, although executed at the defendant's request, formed any legal consideration for the promise alleged to have been made by the latter. Our judgment, therefore, must be for the defendant.

Judgment for the Defendant.

(a) 11 M. & W. 641; See S. C. *ante*, Vol. 1, p. 304.

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DEBT for money had and received, and on an account stated.

Plea, never indebted.

At the trial before *Maule, J.*, at the sittings in Middlesex during Easter Term, an agreement under seal was given in evidence, bearing date the 23rd of July, 1841, and made between the plaintiff of the first part, William Baker of the second part, John Bates, one of the defendants, described as the public officer of the West of England and South Wales District Banking Company, of the third part, and the said John Bates and one Savory, the defendants, of the fourth part. The deed recited that a debt of 2040*l.* had been proved in Chancery, in a cause then depending, and was due to the plaintiff and William Baker, as partners, in equal moieties; and after further reciting a dissolution of their partnership, and that the plaintiff had a banking account with the aforesaid banking company, and was indebted to them in a large sum of money, and that they had agreed to continue to be his bankers, on the terms that his moiety of the aforesaid debt should be assigned to the defendants, in manner hereinafter contained; it was witnessed, that in pursuance of the said agreement, and in consideration of the premises, and for securing the payment of all and every sum and sums of money due or to become due from him, the plaintiff, to the person or persons for the time being constituting the firm of the said bank, not exceeding in the whole on the balance of accounts the principal sum of 500*l.* the plaintiff assigned to the defendants the said undivided moiety of the said debt, with trusts for sale. By a proviso in the deed it was declared that the defendants should, out of the monies to be received by them, in the first place, deduct, retain, and pay all costs, charges, and expenses attending any such sale or sales as aforesaid, and also the costs attending the preparation of the assignment, or in any

The plaintiff assigned to the defendants, by deed, a debt due to him, upon trust, first, to pay the costs and charges of the trust itself; secondly, to pay money due from the plaintiff to a Banking Company, not exceeding 500*l.*; thirdly, to pay the surplus, if any, to the plaintiff. The defendants having received 758*l.* under this deed, the plaintiff brought the present action for money had and received to his use. There was no proof of any account stated, nor of the precise amount to which the plaintiff would be entitled.

Held, first, that money had and received would not lie against the defendants, as the trust was still open.

Secondly, that the defendants might avail themselves of the defence that the contract was by deed, under the general issue.

The proper form of action in such a case is covenant upon the deed; per *Cresswell, J.*

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manner relating thereto, or to the trusts thereby created : and in the next place, should pay to the said banking company, or to their assigns, all sums of money due or to become due from the plaintiff to the said banking company, in respect of any bills of exchange, promissory notes, drafts, or other securities held or discounted by the said banking company, not exceeding on the ultimate balance of accounts the principal sum of 500*l.* ; and in the last place, should pay over the surplus (if any) of the proceeds to the plaintiff, his executors, administrators, or assigns.

It appeared that on the 7th of April, 1844, the defendants received from the fund which was the subject of the trust deed 758*l.* ; and on the 10th of April the present action was brought. No account had been stated between the plaintiff and the defendants, and there was no proof of the amount which the defendants would be liable to pay, under the first two trusts of the proviso in question.

The learned Judge was of opinion that the action was not maintainable, and directed a nonsuit to be entered ; but gave leave to the plaintiff to move to enter a verdict in his favour, for such sum as should be ascertained to be due by an arbitrator. A rule nisi having been obtained in Easter Term,

Talfourd, Serjt., (with whom was *Butt*,) now shewed cause. The nonsuit was right. In the first place, debt will not lie in this case for money had and received ; the action, if maintainable at all, should have been brought upon the deed. In all cases, except that of debt for rent, where a deed is the foundation of the action, the deed must be declared upon ; 1 *Saund.* 276, n. (1.) In *Atty v. Parish* (a), which was an action upon a contract for freight and demurrage entered into by deed, it was held that the plaintiff could not declare in debt generally, and give the deed in evidence ; but that he ought to have declared upon the deed. Debt upon an indenture of demise, for rent, was there

(a) 1 N. R. 104.

treated as an exception to the general rule, and *Mansfield*, C. J., who delivered the judgment of the Court, said, (a) “since therefore, all the books speak of the case of debt for rent as an exception, it is strong evidence to shew that in all other cases a deed must be declared upon.” *Filmer v. Burnby* (b), and *Schack v. Anthony* (c), are also authorities in favour of the defendants. *Foster v. Allanson* (d), and *White v. Parkin* (e), which may, perhaps, be relied upon on the other side, are entirely distinguishable from the present case. In *Foster v. Allanson*, where the plaintiff and defendant had entered into a deed of partnership for seven years, in which there was a covenant to make a final settlement at the expiration of the partnership, it appeared that on the dissolution of the partnership the parties met and settled their accounts, and that a balance was found due from the defendant to the plaintiff, which the defendant promised to pay. The Court, therefore, held in that case that assumpsit would lie on such express promise, and that the deed was mere matter of inducement. It was contended, in *White v. Parkin*, that the terms of a sealed charter-party could not be varied by a subsequent parol contract; but it was held that, as the parol contract was distinct from, and not inconsistent with, the contract by deed, there was no variance, and that, therefore, the parol contract might be enforced by an action of assumpsit. The action, therefore, it is submitted, is improperly conceived. But, secondly, a cestui que trust cannot maintain an action at law against his trustee, unless there has been an adjustment of the balance of money received by the latter. In *Roper v. Holland* (f), it was held that the defendant might be taken to have admitted such a balance; but in the present case no account has been stated. The plaintiff must show, in an action for money had and received, that he is entitled to some definite

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(a) 1 N. R. 109.

(d) 2 T. R. 479.

(b) 2 M. & G. 529; See S. C.

(e) 12 East, 578.

9 Dowl. 466; 2 Scott, N. R. 689.

(f) 3 A. & E. 99; See S. C.

(c) 1 M. & S. 573.

4 N. & M. 668.

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and specific sum, *Harvey v. Archbold*(a); but the plaintiff in this case only shewed that a gross sum had been received by the defendants, from which certain unascertained deductions had to be made before he was entitled to the surplus. The money, therefore, was not received to the use of the plaintiff, but to the use of the trust; and no action will lie for the balance, until the trust is closed. The law on this subject is stated with great accuracy and precision by *Burrough, J.*, in *Case v. Roberts*(b). "If money is paid into the hands of a trustee for a specific purpose, it cannot be recovered in an action for money had and received, until that specific purpose is shewn to be at an end. The action for money had and received must not be turned into a bill in equity for the purpose of discovery. If the plaintiff shew that the specific purpose has been satisfied; that it has absorbed a certain sum only, and left a balance; such balance (the trust being closed) becomes a clear and liquidated sum for which an action will lie at law. Whilst the matter remains in account, and is charged with the specific trust, the action for money had and received will not lie."

Atcherley, Serjt., (*Peacock*, with him), to support the rule. First, there is no covenant in this deed relating to the trusts, but only a proviso. [*Tindal, C. J.*—If you will look into *Com. Dig.* tit. "*Covenant*," (A 2) you will see that a covenant does not depend on any particular form of words.] Then, secondly, although there be a covenant in the deed, debt for money had and received will lie. *Atty v. Parish*(c), is not law. In the case of *Burnett v. Lynch*(d), *Holroyd, J.*, says, "I have considerable doubt whether covenant would lie; but even if it would, that would not take away from the plaintiff the right to maintain an action upon the case." [*Tindal, C. J.*—There is often an election between covenant and case.] In *Tilson v. The Warwick Gas Light Com-*

(a) 3 B. & C. 626; See S. C.
 5 D. & R. 500.
 (b) Holt's N. P. C. 501.

(c) 1 N. R. 104.
 (d) 5 B. & C. 607.

pany (a), *Bayley*, J., says, "I cannot subscribe to the law laid down in *Atty v. Parish* (b). I do not admit that where the contract is such that the plaintiff may recover upon it, whether it is by deed, or not, the deed, if there is one, must be declared upon; on the contrary, the strong inclination of my opinion, upon principle, is, that though there is a deed, still, if there is a debt independent of the deed, except that the amount of it is to be ascertained by the deed, the existence of the deed does not prevent the plaintiff from recovering the debt upon the common counts." Thirdly, it is not competent to the defendants to set up the existence of the deed as a defence to the present action. In *Filmer v. Burnby* (c), *Maule*, J., says, "the allegation of a promise in a declaration in assumpsit imports a parol promise, a promise not under seal; and upon non-assumpsit pleaded, the allegation is not supported by shewing a promise under seal."

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TINDAL, C. J.—This is an action to recover money had and received by the defendants to the use of the plaintiff. The ground on which this form of action is maintainable is, that the defendant has received a sum of money which, *ex æquo et bono*, he ought to pay over to the plaintiff; and that has been the principle on which the cases have proceeded from the time of Lord *Mansfield* down to the present day. I have never known a case in which that action has been held to lie, in which some definite and specific sum has not been proved to be due to the plaintiff. This, however, is a case in which, after the money has come into the hands of the defendants, they have something to do with it, in pursuance of a contract to which the plaintiff was a party, before any of it comes to the plaintiff himself. The contract

(a) 7 D. & R. 381. *Vide tamen*, S. C. 4 B. & C. 968, where the language of *Bayley*, J. is differently reported; and see the judgment of *Cresswell*, J. *post*.

(b) 1 N. R. 104.

(c) 2 M. & G. 548. The context, however, shews that Mr. J. *Maule* must be understood here, as speaking of the plaintiff's proof.

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was, that the defendants should receive the proceeds of a suit in the Court of Chancery, in which the plaintiff was interested, upon certain specific trusts; the first of which is, to defray all the costs and charges of the trust; and the second, to repay to the Banking Company all the advances which had been made by them to the credit of the plaintiff, and their banking charges, not exceeding in the whole 500*l*. Then comes the third trust, on which alone arises the plaintiff's right to recover any thing, and that is, to pay over the surplus, if any, to the plaintiff. Now, this action has been brought before any thing could be ascertained under the trust, and the plaintiff at once says to his trustees, "you have received a larger sum than 500*l*., and the difference, by mere operation of law, becomes money had and received to my use." But how is the amount of the difference to be ascertained? In the first place, what is the amount of the costs and charges attending the execution of the trust? For any thing that appears to the Court, they may completely absorb the whole amount of the fund. In the next place, what is the sum due to the Banking Company? It appears to me that, instead of filing a bill for an account in equity, the plaintiff has preferred taking a shorter, and as he no doubt considers, a more convenient course; but if we were to say that this action was maintainable, it would be the first of the kind that has been held to be so. *Roper v. Holland* (a), is an authority against the plaintiff, because what is there said shews that the action would not have been held good, unless there had been an account stated; and the observations of *Burrough, J.*, in *Case v. Roberts* (b), are strong to shew that this action cannot be supported. Looking at this case, it seems to me to come within that class of cases of which *Weston v. Downes* (c), and *Cooke v. Booth* (d), are examples, and in which, money having been received under a special contract, it has been held, that an action for money had and received will not lie, until the special contract has been rescinded.

(a) 3 A. & E. 99.

(b) Holt's N. P. C. 501.

(c) 1 Doug. 23, a.

(d) Cowp. 819.

COLTMAN, J.—It is laid down in *Case v. Roberts* (a), that money had and received will not lie against a trustee, until the trust has been closed, and a balance shown; but here it is not yet settled what amount the plaintiff will be entitled to receive.

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CRESSWELL, J.—I think the nonsuit was quite right. Two objections were made at the trial: first, that the action ought to have been brought in covenant upon the deed, and not in debt for money had and received to the plaintiff's use; and secondly, that the defendants were trustees, and that the trust was not closed. It is not absolutely necessary to determine the first point, because the second objection is a decisive answer to the action. At the same time it must be recollected that *Atty v. Parish* (b) is a strong authority against the maintenance of the action on the first ground of objection. It is said that *Atty v. Parish* is overruled by *Tilson v. The Warwick Gas Light Company* (c), but I cannot consider that case as so overruling it. In the first place, the point was not necessary for the decision of that case, and there is also considerable difference in the language attributed by the reporters to Mr. Justice Bayley. My Brother Atcherley cites the report from *Dowling* and *Ryland* (d), in which Mr. Justice Bayley is made to say, "I cannot subscribe to the law laid down in *Atty v. Parish*" (e). In another report (f) he is represented to have said, "I am not convinced by the case of *Atty v. Parish*, that where a contract appears upon the face of a declaration to be such that the plaintiff may recover whether the contract be by deed or not, it is necessary to declare upon the deed if there be one." In point of fact, therefore, all that the learned Judge says is, "*Atty v. Parish* may be good law, yet it does not convince me that, under certain circumstances, a plaintiff

(a) Holt's N. P. C. 500.

(d) 7 D. & R. 381.

(b) 1 N. R. 104.

(e) 1 N. R. 104.

(c) 7 D. & R. 376; See S. C.
4 B. & C. 962.

(f) 4 B. & C. 968.

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may not recover in some other form of action than covenant." In the report to which I have just referred, he goes on to say (a), "The strong impression upon my mind is that upon principle, although there be a deed between the parties, yet if there be a debt independent of the deed, the amount of which, however, is to be ascertained by the deed, the existence of the deed will not prevent the party from recovering that debt upon the common counts." That may be so, and *Atty v. Parish* may be very good law notwithstanding. It is worthy of remark, also, that *Holroyd, J.*, says nothing about that case, so that it would seem that he was not prepared to overrule *Atty v. Parish*. It may be that circumstances might occur which might make it not necessary to sue upon the deed, but upon the original contract, made independent of the deed; but what simple contract is there in this case independent of the deed? The parties take the money under the deed, and are to deal with it according to that deed. How, then, can it be intended that there was any implied contract, when there is an express contract under seal? Then, as to the state of the pleadings, *Filmer v. Burnby* (b), is quite in point to shew that this objection may be taken under the general issue. If there has been an original simple contract, which has been merged in a contract under seal, it would be necessary to set out in a special plea the deed, in order to shew the merger; but here the plaintiff is obliged to resort to the deed in the outset, and having proved that the only contract ever entered into between the parties was by deed, the very foundation of the action is taken away. On the other point, I quite agree in thinking that the mode in which *Burrough, J.*, expressed himself in *Case v. Roberts* (c), on the subject of an open trust, is conclusive on this question; and that this is an open trust, is palpable. There are three or four things to be done with the money, before the plaintiff is to receive the overplus, and if he had declared in covenant for the over-

(a) 4 B. & C. 968.

(c) Holt's N. P. C. 500.

(b) 2 M. & G. 529.

plus, he could not have recovered without first shewing the performance of the trusts. The nonsuit, therefore, must stand.

Rule discharged.

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CURLING and Others v. ROBERTSON.

BYLES, Serjt., moved for a rule to shew cause why the Master should not review his taxation. The Master had refused to allow the costs of the examination of one John Virtue, who had been examined on the part of the defendant upon interrogatories previously to the trial of the above cause, the witness being about to go abroad. The affidavit stated that the defendant had been advised by counsel that Virtue was a necessary witness; but that, after he had been examined, upon a consultation which took place just before the trial, it was determined not to put the examination in evidence. At the trial, the interrogatories were brought into Court, but were not used by the defendant, who obtained a verdict. It is submitted that the costs of the examination ought to have been allowed. The present case is analogous to that of a witness present at the trial, but not called on to give evidence. [*Cresswell*, J.—By a compulsory process of the Court you obtain a knowledge of the evidence which the witness can give, and then, not liking his evidence, you make no use of it at the trial].

The Master having refused on taxation to allow the costs of examining a witness upon interrogatories; the interrogatories not having been offered in evidence at the trial: Held, no ground for a review of the taxation.

PER CURIAM.

Rule refused.

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GORDON and Others v. ELLIS and Another.

To an action of indebitatus assumpsit for money received by the defendants for the use of the plaintiff, and for money due on an account stated, the defendants pleaded that the plaintiffs were co-partners in trade: that the plaintiff Gordon, with the privity of the other plaintiffs, employed the defendants to sell certain personal property belonging to the plaintiffs as such co-partners, which the defendants agreed to do: that, at the time of Gordon's applying to the defendants to sell, and also at the time of the sale, and

of their making the advances thereafter mentioned, they believed Gordon to be the sole owner of the property, and that he had full authority to dispose of it as his own, they the defendants having no knowledge that the other plaintiffs had any interest in it: that after they had been so employed to sell the property, and before it was sold, they did, at the request of Gordon, advance to him the sums of money mentioned in the plea, upon an agreement before made between them, that they the defendants might reimburse themselves out of the proceeds of the property to be so sold: and that the advances were made on the faith of such agreement and not otherwise: and that they did afterwards sell the said property for Gordon, "*the other plaintiffs at the said several times aforesaid suffering and permitting the said Gordon to deal therewith as his own sole property, without objection or interference.*" The plea then justified the retaining the money to reimburse themselves for such advances under that agreement. The plaintiffs, in their replication, traversed the allegation in italics. After verdict for the plaintiff for the full amount: *Held*, on motion in arrest of judgment, that the traverse was an immaterial one, and that the proper course was not to arrest the judgment, but to award a repleader.

The rule that a repleader is never awarded in favour of that party who makes the first fault in pleading, only holds where the immaterial issue is found against the party who made the first fault in pleading.

THIS was an action tried before Mr. Justice *Coltman*, at the sittings after Hilary Term, at Westminster, in which there was a verdict for the plaintiff for 835*l.* 18*s.* 4*d.* The action was in indebitatus assumpsit for money had and received by defendants for the use of the plaintiffs, and for money due on an account stated; to which the defendants had pleaded various pleas, the fifth and sixth alone of which are material on the present occasion. These pleas were pleaded to different parts of the plaintiffs' demand, and were in form precisely alike, as were the replications thereto.

Plea. And for a further plea in this behalf as to, &c., parcel, &c., the defendants say, that before the said money in the said declaration mentioned had been had or received by the defendants, and also before the stating of the said accounts in the declaration mentioned, or either of them, to wit, on, &c., the plaintiffs carried on the trade and business of founders, in partnership together, as copartners; and thereupon while they, the plaintiffs, continued to be and were such partners as aforesaid, to wit, on the day and year aforesaid, the plaintiff, M. F. Gordon, with the privity and concurrence of the other plaintiffs, applied to and requested

the defendants, (they then and still being, and carrying on, in partnership together, the trade or business of auctioneers and appraisers,) and also then retained and employed them, the defendants, to put up to sale and dispose of, certain property of and belonging to the said firm, and to the plaintiffs as such copartners as aforesaid, which they, the defendants, then assented and agreed to do. And the defendants further say, that at the time when the said M. F. Gordon so applied to and requested them to sell and dispose of the said property, and also at the time of their selling and disposing thereof, and of their making the loans and advances to the said M. F. Gordon hereinafter mentioned, they, the defendants, believed that the said M. F. Gordon was the sole and exclusive owner of the said property, and had full power, and lawful and absolute authority to sell and dispose of the same, as and for his own property, and for his own sole use, benefit, and advantage; they, the defendants, then having, and they in fact say, that they then had, no knowledge or notice whatsoever that the other plaintiffs, or any other person whatsoever, had any right, title, or interest whatsoever in the said property. And the defendants further say, that after they had been so applied to, and requested, and retained, and employed by the plaintiff, M. F. Gordon, to sell and dispose of the said property as aforesaid, and before the same had been sold or disposed of, and before they had any notice or knowledge whatsoever, that the said plaintiff, M. F. Gordon, was not solely and exclusively possessed of, and interested in, the said property; to wit, on, &c., and on divers other days and times between that day and the commencement of this suit, they, the defendants, at the request of the said M. F. Gordon, did lend and advance to him divers sums of money, in the whole amounting to the said sum of money in the introductory part of this plea mentioned. And the defendants further say, that before they, the defendants, lent or advanced the last mentioned moneys, or any part thereof, to the said

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M. F. Gordon, to wit, on the day and year aforesaid, it was agreed between him and them, that they, the defendants, should and might retain, deduct, and reimburse themselves, the full amount of the said moneys out of the proceeds of the said property, so to be sold and disposed of as aforesaid. And the defendants further say, that they were induced to advance and lend, and did advance and lend, the said moneys to the said M. F. Gordon, upon the faith and confidence, and in consideration of the said last mentioned agreement, and not otherwise. And the defendants further say, that afterwards, and before the commencement of this suit, to wit, on the same day and year last aforesaid, they, the defendants, did sell and dispose of the said property for the said M. F. Gordon, *the other plaintiffs, at the said several times aforesaid, suffering and permitting the said M. F. Gordon to deal therewith as his own sole property, without objection or interference*; and afterwards, before the commencement of this suit, to wit, on the day and year last aforesaid, received the money for which the same was so sold as aforesaid. And the defendants further say, that the said money in the declaration mentioned to be due from them to the plaintiffs, is the same identical money which they, the defendants, received as the price, purchase money, and proceeds of the said property, and not other or different. Wherefore, they, the defendants, did, in pursuance of the said agreement, and before the commencement of this suit, retain the said sum of money in the introductory part of this plea mentioned, for the purpose of reimbursing themselves the moneys so advanced and lent by them to the said M. F. Gordon as aforesaid. And this the defendants are ready to verify.

Replication. That the plaintiffs, J. Reid and G. H. Phipps, did not suffer or permit the said M. F. Gordon to deal with the said property in the said plea mentioned as his own sole property, without objection or interference, in manner and form, &c. Conclusion to the country. Similiter.

In Easter Term,

Sir *Thomas Wilde*, Serjt., moved for a rule, calling on the plaintiffs to shew cause why the entry of final judgment on the above verdict should not be stayed. It is submitted, that there is a sufficient defence on these pleas without the averments which the plaintiffs have traversed, and which are indeed immaterial. The pleas state, and it is not denied, that the defendants retained the sum therein mentioned by the assent and agreement of Gordon, one of the plaintiffs, and that they did not know of the interest of the other plaintiffs, so that all fraud on their part is negatived. Gordon clearly could not recover the money so retained by his own agreement, if he were suing alone. And if he could not, neither can the other plaintiffs recover in conjunction with him as co-plaintiffs. For that which is an answer to one co-plaintiff, is an answer to all; *Jones v. Yates* (a), *Sparrow v. Chisman* (b), *Jacaud v. French* (c), *Richmond v. Heapy* (d). The case of *Wallace v. Kelsall* (e), is almost precisely the same as the present, except that there the question arose on demurrer.

A rule nisi having been granted,

Channell, Serjt., (with whom was *Bovill*,) now shewed cause. It is submitted, that these pleas would be insufficient without the averments traversed. The pleas admit that the defendants have received the proceeds of property belonging to the partnership, and that they claim to retain them in respect of an advance made to one partner alone, and in pursuance of an agreement made with him alone. Now the implied authority which one partner has to bind his copartners, would not suffice to render this a valid answer to an action by the copartners; and there is no express authority stated. The defendants are compelled, therefore, to shew laches on the part of his copartners, which they do

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(a) 9 B. & C. 532; See S. C.
4 M. & R. 613.

(b) 9 B. & C. 241; See S. C.
4 M. & R. 206.

(c) 12 East, 317.

(d) 1 Stark. N. P. C. 202.

(e) 7 M. & W. 264; See S. C.
8 Dowl. 841.

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by the averments which have been traversed. They thus seek to bring the case within the principle of the decision in *George v. Clagett*, (a), which is recognised in *Baring v. Corrie* (b). In *Carr v. Hinchliff* (c), which was an action for goods sold and delivered, the defence was a set-off against the broker, who, with the privity of the principal, had sold the goods in question as his own, and a plea stating that defence was held good. In the present case, they cannot shew the privity of the principals, but they try to shew their laches. A loan to one of several partners is not a payment in advance to the firm. It is objected on the other side, that that which is an answer to one co-plaintiff is an answer to all; although it is admitted that one of several defendants can shew fraud on the part of the others. But that proposition is too largely framed to be correct; for if so, a set-off against B., might be pleaded as such in an action by B., C., and D. The true rule is, that where partners come into Court, relying solely on the act of one of them; they cannot afterwards repudiate his authority when his act tells against them. The plaintiffs here have a cause of action quite independent of the act of Gordon. The case of *Jones v. Yates* (d), does not warrant the distinction which is sought to be drawn between the rule that applies to partners when plaintiffs, and to partners when defendants. In the present case, the defence, it is apprehended, is not that there has been fraud; the defendants simply shew an agreement with Gordon, which, by a variety of facts, they contend is binding on the plaintiffs. This defence could not be pleaded by way of set-off. The plaintiffs, in regard to a set-off, are in the same position, as if an action were brought for the subject of the set-off, and they resisting as defendants. In the case of a dormant partner who is joined in an action, the defendant, who would have a right of set-off as against the ostensible partner, is not deprived of his set-off. So here,

(a) 7 T. R. 359.

7 D. & R. 42.

(b) 2 B. & A. 137.

(d) 9 B. & C. 532.

(c) 4 B. & C. 547; See S. C.

they attempt to make out that Gordon is, as it were, the ostensible, and the others, the dormant partners. The plea is grounded on want of fraud on the part of the defendants, and laches on the part of the plaintiffs. The plaintiffs could not have demurred to this plea; for it is laid down, that if a plea state a matter of defence merely as inducement to another matter of defence, it is not bad for duplicity (*a*). [*Cresswell*, J.—That is only where the matter is a necessary inducement.] The case of payment to one of several partners is different; there, there is an implied authority. *Wallace v. Kelsall* (*b*) was where payment was made to one of several partners. The plaintiffs could not reply *de injuriâ*, according to *Purchell v. Salter* (*c*). [*Cresswell*, J.—It may turn out that you could do nothing else but demur.] At any rate, the defendants are not entitled to have the judgment arrested. That can only be when they can resist the whole of the plaintiff's case. At most, they can only have a repleader awarded to them. And the rule that a repleader is never awarded in favour of the party making the first slip in pleading, does not apply; for here it is the defendant who asks for it, and not the plaintiff. He cited *Wordsworth v. Brown* (*d*), *Plomer v. Ross* (*e*), *Com. Dig.*, tit. "*Pleader*," (R) 18.

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Sir *T. Wilde*, and *Byles*, Serjts., (with whom was *J. W. Smith*), in support of the rule. The materiality of these averments will be the same as if Gordon were sole plaintiff. There is nothing of set-off, except in a popular sense, in these pleas. Non constat but that Gordon obtained this money to pay the partnership debts. There are two material facts in these pleas, which the plaintiffs might have traversed; either, that the agreement between Gordon and the defendants was as there stated; or, that any

(*a*) Stephen on Pleading, 290, 4th ed., and the authorities there referred to.

(*b*) 7 M. & W. 264; See S. C. § Dowl. 841.

(*c*) 1 Q. B. 197; See S. C. 1 G. & D. 682; 9 Dowl. 517.

(*d*) 3 Dowl. 698.

(*e*) 5 Taunt. 386; See S. C. 1 Marsh. 95.

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advance was made. To hold that upon the facts stated in the plea, the plaintiffs are entitled to bring this action, would be to allow the plaintiff Gordon to take advantage of his own wrong; and if he could not do that in an action in which he is sole plaintiff, neither can he when joined with others as co-plaintiffs. *Wallace v. Kelsall* (a), is directly in point. To the same effect are the decisions in *Jones v. Yates* (b), *Jacaud v. French* (c), *Sparrow v. Chisman* (d), and *Richmond v. Heapy* (e). *Carr v. Hinchliff* (f) is distinguishable; for in the case of principal and agent, the agent must be clothed with some authority; but not so in the case of partners. The pleas are not double; for they only state sufficient to make them good as against Gordon; if more is stated than is necessary for that purpose, it does not make the pleas double. This is not the case of taking issue on a plea not disclosing a sufficient bar to the action. Here the facts not traversed are admitted. In *Wordsworth v. Brown* (g), there was an imperfect state of the record altogether. The only relief the Court can award, is by arresting the judgment; for a repleader will not be granted. In *Negelen v. Mitchell* (h), it was decided, that where there are several pleas on the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters which have been disposed of on proper issues, the Court will not grant a repleader. The following cases were also cited; *Kempe v. Crews* (i), *Webster v. Bannister* (k), and *Taylor v. Whitehead* (l).

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.
 —This case comes before us on a rule to shew cause why

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| (a) 7 M. & W. 264; See S. C. | 7 D. & R. 42. |
| 8 Dowl. 841. | (g) 3 Dowl. 698. |
| (b) 9 B. & C. 532. | (h) 7 M. & W. 612; See S. C. |
| (c) 12 East, 317. | 1 Dowl. 110, N. S. |
| (d) 9 B. & C. 241. | (i) 1 Ld Raym. 167. |
| (e) 1 Stark. N. P. C. 202. | (k) 1 Doug. 393. |
| (f) 4 B. & C 547; See S. C. | (l) 2 Doug. 745. |

judgment for the plaintiffs should not be arrested as to so much of their demand as is contained in the introductory part of the pleas, fifthly and sixthly pleaded by the defendants. Those pleas contain each of them the same ground of defence to different parts of the plaintiffs' demand, and the decision as to one will therefore govern the other plea. The argument on the part of the defendants has been, that the replication puts in issue one allegation only contained in the plea, and that there is enough remaining in the plea unanswered, to form a good bar as to so much of the plaintiffs' right of action as the plea professes to extend to; and that the defendants have in consequence the right to pray that the judgment may be arrested.

The first question, therefore, is, whether the several allegations in the plea which are not denied by the plaintiffs' replication do amount to a legal answer to the plaintiffs' right of action. The second question will be, admitting such unanswered allegations in the plea to be sufficient to bar the plaintiff, what will be the legal result as to the plaintiffs' right to judgment.

The plea, as it appears to us, is not framed by the defendants as, nor is it intended to be, a plea of set-off; but purports to be either a plea of payment by them of a certain part of the plaintiffs' demand to Gordon, one of the plaintiffs; or a plea setting up a right to retain a part of the money, received by the defendants for the use of the plaintiffs, under a special agreement made for that purpose with Gordon. The arguments, therefore, urged by the plaintiffs' counsel, and the cases cited as to the defendants' right of setting off a sum lent by them to Gordon against him and his partners, we think inapplicable to the present case. The real point in dispute, as it appears to us, is, whether the agreement disclosed by the plea, is one which Gordon had, by law, the power of making, so as to bind his other partners. Looking at the several allegations in the plea which are not traversed, and which are therefore admitted on the record to be true, for the purpose of the present

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discussion, it appears; that the plaintiffs were copartners in trade: that the plaintiff Gordon, with the privity of the other plaintiffs, retained and employed the defendants to sell certain personal property belonging to the plaintiffs as such copartners, which the defendants agreed to do: that, at the time of Gordon's applying to the defendants to sell, and also at the time of the sale, and of their making the loans and advances, they believed Gordon to be the sole and exclusive owner of the property, and that he had full authority to dispose of it as his own, they the defendants having no knowledge that the other plaintiffs had any interest in it: that, after they had been so retained and employed to sell the property, and before it was sold, they did, at the request of Gordon, lend and advance to him the sums of money mentioned in the plea, upon an agreement before made between them; that they the defendants might retain, deduct, and reimburse themselves the full amount of such monies out of the proceeds of the property to be so sold: and that the loans and advances were made on the faith and confidence of such agreement, and not otherwise: and the plea then justifies retaining the money to reimburse themselves for such advances under the said agreement.

We think the facts stated in this plea, amount to a good defence, as to so much of the demand, as the plea covers. If Gordon had been the sole plaintiff, he could not have maintained this action in the face of his own agreement; and, if he could not sue alone, it is difficult to see upon what ground he can, when joined with his partners, have a right to sue. Gordon was the acting partner; and there can be no doubt, that, where he has authorized partnership property to be sold, with the assent of his copartners, he may also agree that part of the proceeds shall be paid to him by anticipation. There is no allegation in the plea, of any collusion between Gordon and the defendants; no averment, that the anticipation of payment was stipulated for to serve the private purposes of Gordon; on the con-

trary, it is consistent with the allegations in the plea, that the advances were necessary for the purposes of the partnership, and that the whole has been actually applied to those purposes. Upon the general principles therefore of the law of partnership, we see no reason for holding them not to be binding on the firm. And the cases relied on by the defendants are strong authorities in support of the validity of the plea. In *Jones v. Yates (a)*, it was held, that, even where the indorsement of bills of exchange to the defendants by one of the plaintiffs was a fraud upon the other plaintiff, his copartner; the two partners could not bring trover against the defendants to recover back the bills: Lord *Tenterden*, in giving the judgment of the Court saying, "they were not aware of any instance in which a person has been allowed as plaintiff in a Court of law to rescind his own act, on the ground that such act was a fraud on another person; whether the party seeking to do this, has sued in his own name only, or jointly with such other person." But, in the present case, as already observed, there is no imputation of fraud upon any body. And the case of *Sparrow v. Chisman (b)*, is an authority to the same effect. *Wallace v. Kelsall (c)*, is equally strong: an accord and satisfaction between the defendant and one of the copartners who were plaintiffs, partly by payment in cash to that plaintiff, and partly by setting off a private debt due from that plaintiff to the defendant, was held a good answer to a joint action by all the partners for a joint demand;—on the principle, that, if one of the plaintiffs be barred, he cannot recover by joining other persons in an action to rescind his own act. We therefore think there is enough of the plea left unanswered to be sufficient to bar the plaintiffs.

The second point for consideration is, whether, under these circumstances, the judgment should be arrested? The replication has traversed the allegation in the plea

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(a) 9 B. & C. 532.

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(b) 9 B. & C. 241.

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“that Gordon was suffered and permitted by the other plaintiffs to deal with the property as his own;” upon which, issue being joined, the jury have found for the plaintiffs. But this traverse is taken by the plaintiffs, as it appears to us, on an immaterial point—a point upon which, after the finding of the jury, we are unable to determine the right between the parties: for suppose the other partners did not suffer Gordon to deal with the property as his own, he still had all the rights which a copartner has with respect to the property—one of which was, to make the agreement with the defendants set out in the plea. The finding therefore decides nothing between the parties. At the same time, it is to be observed, there are two material allegations in the plea, either of which, if traversed and the issue found for the plaintiffs, would be decisive of the right; for, if the agreement set out in the plea is denied, or the advance of the moneys under it, and either of such issues is found for the plaintiffs, there is no defence to the action.

In this state of the record, we are of opinion that the proper course is, not to arrest the judgment, but to give judgment “quod partes replacitent,” in order to give the party who has made the first fault in pleading the opportunity of setting it right: see the authorities collected in *Bac. Abr.* tit. “*Pleader*,” (M 1). And the adverse party has no right to complain of this course; for, he is in some degree instrumental to it himself, by going down to trial upon an immaterial issue. This distinction seems to be established by the late case of *Atkinson v. Davies* (a), which was not adverted to in the course of the argument. And, as to the argument used at the Bar, that a repleader is never awarded in favour of that party who has made the first fault, that doctrine only holds where the immaterial issue is found against the party who made the first fault in pleading; as is stated arguendo in the case of *Kempe v. Crews* (b), for

(a) 11 M. & W. 236; See S. C. (b) 1 Ld. Raym. 167.
2 Dowl. 778, N. S.

which the authorities are there cited; and, in the present case, it cannot apply, where the issue is found in favour of the plaintiffs, who took it.

We, therefore, think there should be an award of judgment of repleader.

Rule accordingly.

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HOLCROFT v. MANBY.

AN action had been brought by one Holcroft against the defendant Manby, who was the secretary of the Institution of Civil Engineers; and a reference of the cause had been made to a barrister, to which the Institution of Civil Engineers had become parties. An award was made on the 16th of June, 1843, in the action, in favour of the defendant; but a sum of 52*l.* 10*s.* was awarded to be paid by the Institution of Civil Engineers to the plaintiff, together with the costs of the reference and award, amounting to the additional sum of 51*l.* 17*s.* On the 27th of June, 1843, the plaintiff filed a petition in the Court of Bankruptcy, and a Mr. Groom was appointed the official assignee. Under these circumstances, the plaintiff's attorney, a Mr. Robson, claimed to have a lien on the award and sums awarded, for his bill, amounting to 200*l.*; and had made application to the Institution of Civil Engineers to pay over to him the sums awarded. This, however, they had refused to do, unless he could obtain from Mr. Groom an authority to them to pay the money over. Mr. Groom, on being referred to, had replied with considerable caution, and had abstained from saying anything which could be treated as a direct sanction to the Institution to pay over the money to Mr. Robson. A rule had, therefore, been obtained on behalf of Mr. Robson, calling on the Institution of Civil Engineers to shew cause why they should not pay him the sum awarded, and the costs of the reference and

The plaintiff and the defendant referred the cause to arbitration, to which reference, C. was a party. C. was ordered by the award to pay a certain sum to the plaintiff. The plaintiff became bankrupt. The plaintiff's attorney in the action claimed the sum awarded from C. as in part payment of his bill of costs: *Held*, that this Court would not, at the instance of the attorney, order C. to pay the sum awarded to him; although he claimed a larger sum as due to him in respect of his bill of costs.

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award, and of the application; and notice of the rule was directed to be given to Mr. Groom, the official assignee.

Channell, Serjt., shewed cause (a). This rule will have the effect of enabling the attorney to issue execution, under the 1 & 2 Vict. c. 110, s. 18; *Doe v. Amey* (b), *Jones v. Williams* (c). There is no precedent of an attorney being allowed in this unusual manner to realize the amount of his bill, merely because he has a lien on his client's property. He cannot call upon the Institution to pay him, as if he were the plaintiff in the action. If the Institution were to pay him, they might still be liable to the plaintiff's assignee, who will not authorize the payment. He cited also *Jones v. Turnbull* (d).

Sir *T. Wilde*, Serjt., in support of the rule. The attorney has a lien upon the sum awarded, and may call upon the parties who are bound to pay it to his client, to pay it to him. The assignee of the plaintiff can take no greater interest in it than the plaintiff himself. If this were the case of a judgment, the attorney would be entitled to issue execution without his client's consent, where the amount of his bill exceeds, as in the present case, the amount of the judgment. Wherever a sum of money is payable by an order of the Court, the Court may direct it to be paid to the party really entitled. If there were any dispute as to the amount of the attorney's bill, that might have been shewn by affidavit. It must, therefore, be taken that the amount is correct; and as it exceeds the amount awarded, the plaintiff is in fact only the trustee for the attorney, and the debt cannot, therefore, pass to the plaintiff's assignee; *Winch v. Keeley* (e). The attorney has authority to receive the amount awarded. If so, a voluntary payment to him

(a) In Easter Term.

(b) 8 M. & W. 565; See S. C.
 1 Dowl. 23, N. S.

(c) 11 A. & E. 175; See S. C.

4 P. & D. 217.

(d) 2 M. & W. 601; See S. C.
 5 Dowl. 591.

(e) 1 T. R. 619.

by the Institution would be protected; much more a compulsory payment by order of the Court.

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TINDAL, C. J., now delivered the judgment of the Court. (After stating the facts of the case as above given, his Lordship proceeded thus):—The Institution of Civil Engineers have always professed to be willing to pay the money on receiving a receipt or other sufficient authority from the assignees of Holcroft sanctioning the payment. Application has been made to Mr. Groom to give such an authority, but to this application he appears to have replied with studied caution, and certainly without saying any thing which can be considered as a direct sanction to the payment being made to Mr. Robson.

No case was cited on the argument before us to shew that an attorney can enforce in this way the payment of a lien.

But, independent of this consideration, it is to be borne in mind that a rule of Court has now the effect of a judgment, and before such an order can be made, the Court must be perfectly satisfied that the claim is free from all doubt.

Mr. Robson is not without remedy in this case. If his claim be well founded, and such as the law entitles him to enforce, he may bring an action in his client's name on the award, in which the decision of the Court will be subject to revision in a regular course by a superior Court; but if the present rule is made absolute, the judgment is final. We feel ourselves bound, therefore, to abstain from deciding, in this summary way, a question in which any legal doubt is involved.

For these reasons we think the present rule must be discharged.

Rule discharged.



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BEDELLS and Another v. MASSEY.

A declaration in an action for the infringement of a patent, made profert of the letters patent, not setting them out verbatim. The defendant, being under terms to plead issuably, pleaded non concessit: *Held*, on motion, that the plea was issuable.

Seemle, that the plea of non concessit, under such circumstances, would be good on demurrer.

The defendant also pleaded that the plaintiffs had represented to the Queen, that their invention was an improvement; that the letters patent were granted on such representation; that such representation was untrue, and that the Queen was deceived; and that the invention was not an improvement: *Held*, that this plea was not the same as a plea that the invention was of no use to the public: *Held* also, that such a plea was sufficiently described in the abstract of pleas, as a plea that the invention was no improvement.

ACTION on the case for the infringement of a patent. The declaration made profert of the letters patent, but did not set them out verbatim. The defendant, who was under terms to plead issuably, delivered an abstract of pleas, by which he proposed to plead, amongst other pleas, first, non concessit; thirdly, that the invention was no improvement; sixthly, that the invention was of no use to the public. The third plea at length was as follows: That before the making of the said supposed letters patent in the declaration mentioned, to wit, &c., the plaintiffs, by their petition in the said supposed letters patent and declaration mentioned, represented and suggested unto her said Majesty, that the said supposed invention mentioned in the declaration, and described in the said instrument in writing, under the hand and seal of the plaintiff, Caleb Bedells, in this defendant's second plea set forth, was an invention of improvements in the manufacture of elastic fabrics and articles of elastic fabrics. And the defendant further says, that her said Majesty, believing and confiding in, and acting and proceeding upon the said representation and suggestion of the plaintiffs, and in pursuance, and in consideration thereof, did make the said supposed letters patent, and also the said gift and grant in the declaration alleged to be made. And the defendant further says, that the said representation and suggestion so made by the plaintiffs to her said Majesty as aforesaid, was false and untrue, and her said Majesty was thereby misinformed and deceived, and that the said supposed invention was not an invention of improvements in elastic fabrics and articles of elastic fabrics, in manner and form as by the plaintiffs so falsely and untruly represented and suggested unto her said Majesty as aforesaid; whereby

and by reason whereof the said supposed letters patent were and are null and void ; concluding with a verification.

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A rule having been obtained, calling on the defendant to shew cause why so much of an order of *Cresswell, J.*, as allowed the defendant to plead the first and third pleas, should not be rescinded, and why the said first and third pleas should not be struck out, with costs ;

Channell, Serjt. (*Mellor* with him) shewed cause. First, with respect to the third plea. Two objections were urged against that plea in moving the rule, viz. that it differed from the abstract, and that it was substantially the same as the sixth plea. With regard to the first objection, there is no ground for it. The defendant alleges that a false suggestion was made to the Crown, and that there was no improvement in the manufacture of the articles. All that is necessary is, that the abstract should describe substantially the nature and object of the plea. [*Tindal, C. J.*—Perhaps the plea might be objected to on the score of duplicity]. The plaintiffs cannot take advantage of such a defect, even if it exist in the plea, upon motion. It is submitted, also, that the plaintiffs would be estopped from traversing the former part of the plea. As to the objection that the defence raised by the third plea is the same as that set up in the sixth, it is apprehended that there is a wide difference between them. The third plea alleges a fraud on the Crown, by a false suggestion that the invention is an improvement ; while the sixth raises the statutable objection, that a patent granted for an invention which is useless, is void. Similar pleas were pleaded in *Morgan v. Seaward* (a). Then, as to the plea of non concessit, that, it is submitted, is a good and issuable plea. There must be some mode of pleading by which the validity of the grant of letters patent may be put in issue. The defendant cannot demand oyer of the letters patent. Neither can he plead nul tiel record,

(a) 2 M. & W. 544.

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Co. Litt. 260, a. In *Baddeley v. Leppingwell* (a), *Wilmot, J.* observes, “‘non concessit’ puts the operation of the grant in question. If a man pleads a grant from the Crown under the great seal; and the other pleads ‘non concessit,’ in this case the letters patent are confessed; but the effect and operation of them is denied: the effect of that issue of ‘non concessit’ is, that the Crown had nothing in the land; or, that the tenements did not pass by the letters patent. So is *Hynde’s case* (b) and *Eden’s case* (c) expressly.” It is submitted, therefore, that the plea is good; but, at all events, the Court will not, on a summary application like the present, prevent the defendant from setting up this defence.

Byles, Serjt., contra. With regard to the plea of non concessit, it is said that there must be some mode of denying the validity of letters patent; but there is no form of plea by which that can be done. Letters patent cannot be denied; *Eden’s case*. [*Tindal, C. J.*—It does not follow that the defendant may not put in issue the existence of the letters patent, as you have pleaded them.] Letters patent cannot be set out on oyer, *The King v. Amery* (d), *Jeffery v. White* (e); and the defendant’s remedy is by motion to the Court on affidavit, shewing that the plaintiff’s statement of the letters patent does not agree with them in reality (f). But further, even if the existence of letters patent could be put in issue by a plea, the plea of non concessit would not have that operation. Non concessit is not an issuable plea. The power of the Queen to grant letters patent is matter of law, and, supposing the plaintiffs to take issue upon the plea of non concessit, what would there be for the jury to try? That plea can only be pleaded where it appears on the face of the grant itself that the Queen had no power to grant, *Com. Dig.* tit. “*Patent*,” (F) 1; but that is not the case here. [*Tindal, C. J.*—The plain-

(a) 3 Burr. 1544.

(b) 4 Rep. 71, b.

(c) 6 Rep. 15, b.

(d) 1 T. R. 149.

(e) 2 Doug. 476.

(f) Per *Buller, J.* 1 T. R. 150.

tiffs do not set out the letters patent in hæc verba, but only state what they suppose to be the legal effect of them]. With regard to the third plea, it is not in conformity with the abstract delivered, and, even if it were, it ought not to be allowed in conjunction with the sixth plea; for if the invention were no improvement, it would be of no use to the public.

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TINDAL, C. J.—The objection to the plea of non concessit is not that it is at variance with the abstract delivered, but that it is no plea at all: but I think it too much to say that we must take it upon ourselves to decide such a question upon motion. The plaintiffs may demur to the plea, if they should be so advised; but it really seems to me to be the only way in which a defendant can dispute the effect of letters patent, and show that the plaintiffs claim one thing, whereas the letters patent grant another. I see no inconvenience which can result from such a plea, because the plaintiffs will only have to produce on the trial the exemplification of the letters patent, and shew that they agree with the statement of their legal effect as set forth in the declaration, and the defendant's plea will at once be answered. As to the third plea, the objection is, that it is at variance with the abstract delivered, and also that it is the same as the sixth plea. I do not think that the abstract ought to be considered too critically, otherwise we must look into it for all the nicety of the plea itself. The substance of the third plea is, that a false suggestion was made to the Crown that the plaintiffs' invention was an improvement, and the abstract says that there was no improvement. That is the real question, for if there was no improvement, the Queen has been deceived in her grant, as alleged by the plea. With regard to the sixth plea, I think it is different from the third, upon the grounds stated by my Brother Channell.

COLTMAN, J.—I am of the same opinion. The third plea states that the Queen has been deceived in her grant,

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and the sixth alleges that the invention was not of public utility. The defences which might be raised under these pleas would be very different. As the objection to the plea of non concessit, if it be tenable, may be taken on demurrer, I do not think that we ought to set it aside upon motion.

MAULE, J.—The plea of non concessit appears to have been frequently pleaded, and seems to me to be the only plea by which the defendant can raise the question, whether the alleged subject-matter of the patent be included in the terms of the patent when properly construed. It is, therefore, a plea to the merits, and, consequently, an issuable plea, and within the terms which the defendant was under of pleading issuably. The third plea is also a plea to the merits. If it be a double plea, it may be demurred to; but I think not only that it is not double, but that it is clearly not so. It is unnecessary, however, to express any opinion on that point, as the objection is, that it is the same as the sixth plea. The third plea denies that the invention is an improvement; the sixth says, that whether there be an improvement or not, the invention is of no use to the public. It appears to me that the two pleas are quite different from one another. Suppose it appeared that the process, for an improvement in which the patent is granted, is not only not useful, but positively detrimental to the public. In that case the patentee would have effected an improvement in a process which it would have been advisable to have suppressed altogether, and which the public had better be without. With respect to the objection that the third plea is not properly described in the abstract, I think that an abstract of pleas, which is merely intended to convey some notion of what defences are to be pleaded, ought not to be scanned too critically; otherwise we should require the same nicety and precision in the abstract as in the pleas themselves.

Rule discharged (a).

(a) See *Bunnett v. Smith*, *post*, p. 380.

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A WRIT of testatum fieri facias had issued in the above cause to the then sheriff of Surrey, under which the goods of the defendant had been seized on the 1st of February, in the present year. A claim was made to these goods by one Mary Clark, upon which the sheriff applied for an interpleader rule, and the following order was made by Mr. Justice Coltman :

“Reynolds v. Barford. Upon hearing the attorneys or agents for the plaintiff, for the claimant, Mrs. Mary Clark, and for the sheriff of Surrey, and reading the affidavits of the said Mary Clark, I order that the said sheriff be discharged ; that the goods seized under the fieri facias herein be sold, and the produce thereof be paid into Court, deducting expenses, unless, within a week, the claimant shall give security to the satisfaction of the Master, to the amount of the levy ; the claimant, in the first instance, to pay possession money from this day till the goods are sold, or security be given, but ultimately by the losing party ; that an issue be tried at the next assizes for Surrey, in which the claimant shall be plaintiff, and the execution creditor defendant ; the question to be, whether the goods seized were, at the time of the seizure, the goods of the claimant. All other questions reserved. Dated the 8th day of February, 1844.

T. COLTMAN.”

The claimant not having proceeded to trial in pursuance of the above order, the plaintiff took out a summons to have it discharged ; whereupon the following order was made by the same learned Judge :

“Reynolds v. Barford. Upon hearing the attorneys or agents for the plaintiff, and Mary Clark, the claimant, I do

A return to a fi. fa. stated that the sheriff had paid a sum “for rent due for the premises whereon the said goods and chattels were taken in execution :” but without stating that the rent was due at the time of the seizure. On motion to quash the return, *Held, sufficient.*

An interpleader rule, directed that the possession money up to a certain date, should be paid, in the first instance, by the claimant, A.B., and finally by the unsuccessful party. A.B. afterwards abandoned his claim. On the sheriff being ruled by the plaintiff to return the writ, it appeared by his return, that he claimed to retain a certain sum for possession money, &c. but not for what period of time he claimed it to be due : *Held, sufficient.*

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order, that my order dated the 8th day of February last, be discharged, and the claim of the said Mary Clark be barred to the goods seized by the sheriff of Surrey, and that the proceeds of such goods, (if any,) after deducting expenses, be paid to the plaintiff, the execution creditor. Dated the 13th of April, 1844.

T. COLTMAN."

On the same day, the plaintiff obtained a rule, calling on the sheriff to return the writ; and on the 20th of the same month, the following return was made:

"Surrey. By virtue of the annexed writ to me directed, I have caused to be made of the goods and chattels of the therein named John Barford, 22*l.* 2*s.*, out of which I have paid 11*l.* 5*s.*, for rent due for the premises whereon the said goods and chattels were taken in execution, and I have retained 6*l.* 12*s.*, for levying the said execution, keeping possession of the said goods and chattels, and selling the same by public auction, and for poundage; and the residue thereof, being 4*l.* 5*s.*, I have ready to pay to Frederick Reynolds, in the said writ named, as therein I am commanded. And I further certify, that the said John Barford hath not any other goods or chattels in my bailiwick, whereof I can cause to be made the residue of the debt and damages therein mentioned, or any part thereof. RICHARD SUMNER, Esq., Sheriff." Filed, 20th of April, 1844.

By the affidavits on which this rule was moved, it appeared, that information had been given to the plaintiff's attorney by the clerk to the defendant's landlord, that no rent was due at the time of the seizure; and that none accrued due until the 8th of February following. The affidavits in opposition stated, that the rent was actually due at Christmas, 1843.

In Easter Term,

Channell, Serjt., obtained a rule, calling on the late

sheriff of Surrey to shew cause why the return made by him to the said writ of testatum fieri facias should not be quashed, with costs. The chief objections urged to the return were; that it did not appear upon the face of it, that the sum deducted for rent, was deducted for rent due at the time of the seizure; and that the sheriff claimed to retain possession money generally in respect of the execution; whereas the possession money up to a certain date, was, by the terms of the interpleader rule of the 8th of February, 1844, to be paid by the unsuccessful claimant, Mrs. Clark, and not chargeable as against the plaintiff.

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Byles, Serjt., now shewed cause, and contended, that the sheriff, having been discharged by the terms of the interpleader order of the 8th of February, was not bound to make any return at all. [*Cresswell*, J.—Then if so, it can do him no harm to have the return quashed.] At any rate, the proper course is, if the truth of the return is disputed, to bring an action for a false return. It sufficiently appears by the affidavits, that the rent was claimed by the landlord as due at the time of the seizure; and if it were not, in point of fact, due, that might be evidence in an action for a false return. The present return is according to one of two forms, to be found in *Tidd's Practical Forms*, p. 365, ss. 45, 46, *ed.* 1828. The case of *Hepworth v. Sanderson* (a), shews under what circumstances the plaintiff will be estopped from ruling the sheriff to return a writ.

Channell, Serjt., in support of the rule. If the sheriff is not bound to return the writ, he should have opposed the rule calling on him to do so. But making the return, he is bound to make it such, that if false, an action for a false return would lie upon it. Here an action would not lie, as there is no allegation in the return that the rent was then

(a) 8 Bing. 19; See S. C. 1 M. & Scott, 64.

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due. [*Tindal*, C. J.—He would be bound to shew that such rent was due, as the law would justify him in retaining out of the levy.] This return is not in conformity with the words of the statute, 8 Ann. c. 14, which only authorizes the payment of such rent as is due at the time of the taking the goods and chattels; nor is it according to the usual form in practice (a). [*Tindal*, C. J.—Have you any authority that the Court will interfere to quash a return, when you might make it the subject of a summary motion, that he should pay over the money to you?] There is no exact authority in point; but it is apprehended, that the mere fact that the Court could give relief on motion, will not induce them to refuse to quash the return. As to the other objection, the sheriff should shew what possession money he claims for, and not leave it in doubt whether he is making a wrongful claim. He cited also *The King v. The Sheriff of Middlesex* (b).

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court.—This was a rule to shew cause why the sheriff's return to a writ of fieri facias should not be quashed. The return was as follows. [His Lordship here read the return.]

The principal objection urged against the return was, that it did not shew distinctly that the rent paid to the landlord was due at the time when the sheriff made the seizure, but was consistent with the rent being due only at the time of the return; and it was argued, that no intendment could be made to support the sheriff's return. No authority was, however, cited, to shew that a rule of such extreme rigour has ever been applied to sheriff's returns; on the contrary, cases are not wanting to shew, that in making returns to writs, a reasonable degree of certainty is

(a) See *Tidd's Pract. Forms*, *Chitty's Forms*, p. 173, 5th ed.
 p. 365, 6, ss. 45, 47, ed. 1828; (b) 1 B. & A. 190.

sufficient, and, at least, not so much requisite as in pleading, as was said by the Court in the *City of London's case* (a). Thus, in a case where the king sued a writ, founded on the Statute of Provisors, (27 Edw. 3, s. 1, c. 1,) which requires that the defendant should be warned two months before the return, and the sheriff returned *præmunire feci, &c.*, *quod esset coram justiciariis, &c.*, *ad idem*, (which is evidently a misprint for *diem*,) in *breve contentum, ad faciendum quod istud breve requirit*; it was objected, that it did not appear that he had warned him two months before the return; to which it was answered, that it should be intended to be as the writ requires; and if the sheriff has not done his office duly, he may have his remedy by writ of deceit (b). So where a *scire facias* issued against a parson to have execution of an annuity, the sheriff returned that he had commanded the bailiff of the franchise, who had returned to him, that long before the return of the writ the parson had resigned his benefice to another, and *quod non habet bona neque catalla infra, &c.* It was objected, that he ought to have returned, *quod non habet bona, neque habuit tempore receptionis brevis*; for it might be, that now he has not, but had then; but it was answered, that it shall be intended by this return, that at the time of the receipt of the writ, he had them not; and afterwards, the Court held the return good enough (c).

The case last cited has a striking analogy to the present. The present return, after it has stated a seizure under the writ, specifies a payment of rent due to the landlord, and in so doing, must be intended to refer to such rent as is due to the landlord according to the rules of law, under a seizure by the writ, that is to say, rent due at the time of the seizure.

If, in truth, the rent was not due at the time of the seizure, an action for a false return would, we think,

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(a) 8 Rep. 121, b.

pl. 56.

(b) Year Book, 39 Edw. 3, pl. 7;

(c) 2 Edw. 4, pl. 1.

Bro. Abr. tit. "Retorne del Brief,"

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clearly lie on this return, which, as against the sheriff, would be understood to mean, that the rent was due at the time of the seizure; for he could never be allowed to defend himself in such an action, by putting a construction on his own return, which would make it bad, when it admits of another construction which will make it good.

It was further objected, that by the order made in the interpleader rule in this case, the costs of keeping possession were directed to be borne by the claimant; and that the return is bad because it claims a deduction for possession money. To this, the answer is, that the possession money payable by the claimant, is but a part of the possession money, namely, that which became due subsequent to the making of the order; that there is other possession money which the sheriff is entitled to claim against the fund, and it does not appear that he has deducted any other than that which he has a right to; if, in fact, he has deducted more than he was entitled to, the party is not without his remedy.

Rule discharged.

BROWN v. COPLEY and Others.

In trover
 against a sheriff
 and two bailiffs,
 the bailiffs
 pleaded separately,
 a justification under
 process issued out
 of the County Court.
 New assignment
 thereto,
 alleging the

TROVER, for a watch, &c.

Plea by the defendant, Sir J. W. Copley, who was sheriff of Yorkshire, not guilty. Issue thereon.

The other two defendants, Bland and Turton, who were bailiffs, pleaded first, not guilty; secondly, that the plaintiff was not possessed of the goods; thirdly, that theretofore, to wit, on the first of June, 1843, at the County Court of

conversion to be the retainer of possession by the bailiffs after the issue of a supersedeas by the sheriff, and notice thereof to them. Plea to the new assignment, not guilty. The bailiffs were specially appointed, and the sheriff took an indemnity from the plaintiff's attorney. A verdict having passed against the sheriff at the trial: *Held*, on motion to enter the verdict in his favour, that he was not liable for the wrongful acts of his bailiffs after the issuing of the supersedeas.

Semble, per *Cresswell, J.*, that the sheriff is a judicial officer, with respect to process issued out of the County Court, and, therefore, not liable for the acts of his bailiffs; and also that the new assignment was ill pleaded, as shewing only *evidence* of a conversion.

Sir J. W. Copley, Bart., sheriff of the county of York, and before the suitors of the said Court, came one Ann Weldon, and there, in the said last mentioned Court, levied her certain plaint against the now plaintiff, of a plea of trover, for damages to the amount of, to wit, 39*s.* 11*d.* for a certain cause of action arising and happening within the jurisdiction of the said last mentioned Court, and thereupon such proceedings were had as by the entry and proceedings of the said Court, still remaining in the said last mentioned Court, fully appear; that the said Sir J. W. Copley, Bart., sheriff, &c., afterwards, to wit, on the 12th of July, 1843, and within the jurisdiction of the said Court, issued his certain precept under the seal of his office, and bearing date the 12th day of July, 1843, to the said Bland and Turton, bailiffs, for the purpose of executing the said precept specially deputed, whereby the said sheriff commanded the said Bland and Turton, that they or one of them should attach the said Brown, the plaintiff in this suit, by his goods and chattels, that he might be and appear at the next County Court, to answer the said Ann Weldon, in an action of trover, damages 39*s.* 11*d.*, and that they should have there the said precept; which said precept was afterwards, and before the said return thereof, to wit, on the 21st of July, 1843, delivered to the said Bland and Turton, who afterwards, to wit, at the said time when, &c., and whilst the said precept was in force, and within the jurisdiction of the said last mentioned Court, did take and seize the said goods and chattels in the said declaration mentioned, as it was lawful for them to do for the cause aforesaid, being the said conversion in the declaration mentioned. Verification.

The replication joined issue on the first two pleas, and to the third plea new assigned as follows: that the plaintiff issued his writ in this suit, and declared thereupon, not for the conversion in the said third plea mentioned, but for the conversion under the circumstances hereinafter mentioned, viz. that the said Sir J. W. Copley, being sheriff as aforesaid, according to the course and practice of the said Court,

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afterwards, and after the issuing of the said precept in the said third plea mentioned, to wit, on the 24th of July, 1843, duly issued his certain precept in writing, under the seal of his office, called a supersedeas, bearing date the same day and year last aforesaid, directed to the said Bland and Turton, his bailiffs, whereby, after reciting that by the said precept, under the seal of his office, (then meaning the said attachment), he commanded them that they should attach the said Brown by his goods and chattels, so that he should appear at the then next County Court, to be there holden for the said county, on Wednesday, the 9th day of August, 1843, to answer to the said Ann Weldon, in the said action in trover; and also reciting that the said Brown had appeared to answer the said Ann Weldon in the plea aforesaid, and as aforesaid; the said Sir J. W. Copley, so being sheriff as aforesaid, did thereupon command the said Bland and Turton, that from the execution of the said last mentioned precept they should altogether desist, and if any goods or chattels of the said Brown had been seized by them or either of them under the said precept, that then, without delay, they should cause the same to be restored and delivered to the said Brown; and that afterwards, and after the issuing of the said precept, called a supersedeas, and before the return thereof, to wit, on the 25th of July, 1843, the said Bland and Turton, then being and continuing in possession of the said goods and chattels so taken and seized, as in the said third plea mentioned, as such bailiffs, had notice of the said supersedeas, and were served therewith, and the said Bland and Turton were requested by the said Brown to restore the said goods and chattels, and every of them, to the said Brown, according to the said supersedeas; but the said Bland and Turton, wrongfully and unjustly, wholly refused, and then converted and disposed thereof to their own use.

Rejoinder by Bland and Turton, that they were not guilty, and issue joined thereupon.

The cause was tried before *Coltman, J.*, at the last York

Assizes, when it appeared that a summons from the County Court, issued at the suit of Ann Weldon, on the 29th of June, 1843, against Brown, the present plaintiff. Brown did not appear in obedience to the summons, and a certificate of service having been filed, an attachment issued to compel his appearance on the 20th of July. It was proved that there were no regular bailiffs of the County Court, but that the course of practice was to deliver the process issuing from the County Court to bailiffs specially appointed, on the nomination of the plaintiff's attorney, who gave an indemnity to the sheriff. The attachment was delivered to Bland and Turton, and, on the 24th of July, the seizure took place. On the same day Brown appeared and obtained the supersedeas, which the bailiffs refused to obey. The indemnity given to the sheriff was produced at the trial. A verdict passed for the plaintiff against the sheriff and Bland, with 8*l.* damages, leave being reserved to the sheriff to move to enter the verdict for him.

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Byles, Serjt., having in Easter Term obtained a rule nisi accordingly,

Talfourd, Serjt., (with whom was *Pashley*) now shewed cause. The sheriff is responsible for the acts of his bailiffs, notwithstanding the admission on the record that a supersedeas had been issued before the conversion took place. Until the case of *Saunderson v. Baker* (a), it was a matter of doubt how far the sheriff was liable for the acts of his bailiff, unless they were done in pursuance of his direct orders. In that case, however, a sheriff was held liable in trespass, where the bailiff had taken the goods of A. instead of the goods of B., though the warrant directed him to take the goods of B. only. In the report of that case by Sir *W. Blackstone*, *Nares*, J. (b), is said to have cited *Tyler v. Johnson* which goes rather further than *Saunderson v.*

(a) 3 Wils. 309; S. C. 2 W. Bl. 832. (b) 2 W. Bl. 834.

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Baker, because the sheriff commanded the bailiff to take in county A., and the bailiff seized in county B.; yet the sheriff was held liable. [*Cresswell*, J.—There the bailiff was acting in pursuance of the authority given to him by the sheriff, but not according to it.] In *Saunderson v. Baker* also was cited 2 *Roll. Abr.* tit. “*Trespass*,” (O), pl. 9, where it is said, “If the sheriff makes a warrant to the bailiff of a franchise to take the goods of a man in execution, and he mistakes the goods, and takes the goods of another man, the bailiff is the trespasser, and not the sheriff,” but, notwithstanding that authority, the Court held the sheriff responsible. [*Cresswell*, J.—The case was distinguishable, because the bailiff of a franchise is not the immediate servant of the sheriff]. Again, in the same case, pl. 10, was cited from the same page in *Roll. Abr.*, “If a man be arrested by the bailiffs of the sheriff, and thereupon he sheweth to them a supersedeas to discharge him, and the bailiffs refuse it, and afterwards detain him in prison, you shall have false imprisonment against the bailiffs, and not against the sheriff.” That authority was also cited in *Smart v. Hutton* (a), but *Parke*, J., said, “The sheriff is liable for whatever the bailiff does under colour of the writ.” So, in *Parrot v. Mumford* (b), which was referred to in *Price v. Peek* (c), it was held that the sheriff was responsible, even where the bailiff made the arrest after the return of the writ; and in *Price v. Peek*, *Tindal*, C. J., says (d), “The act of the bailiff in the execution of a writ, though not justified by the writ, is the act of the sheriff himself.” [*Tindal*, C. J.—How is the detainer of the goods in this case after the supersedeas an execution of the writ?] The responsibility of the sheriff was not determined by the supersedeas. There is no difference in principle between the case of a bailiff who has a good writ in the first instance, but who afterwards refuses to obey a supersedeas, and that

(a) 8 A. & E. 568, n.

S. C. 1 Scott, 205.

(b) 2 Esp. 585.

(d) 1 Bing. N. C. 385.

(c) 1 Bing. N. C. 380; See

of a bailiff who, being directed to take the goods of A., takes the goods of B. It is a general rule that the sheriff is answerable for the wrongful acts of his bailiff; *Laycock's case* (a), *Woodgate v. Knatchbull* (b), *Raphael v. Goodman* (c), (where the authorities are collected,) *Sturmy v. Smith* (d), *Balme v. Hutton* (e). Secondly, it is submitted, that the sheriff is not exonerated on the ground that he is a judicial officer. It was proved that there were no regular bailiffs of the County Court, but that the sheriff took an indemnity from the plaintiff's attorney, who appointed the bailiffs; and this brings the case within the rule laid down in *Bradley v. Carr* (f), where it was held, that although the steward of a Court Baron would not be liable where the process was directed to the bailiff of the Court, he was responsible when the writ was issued to special bailiffs, nominated by the attorney of the plaintiff, and he had taken an indemnity to protect himself against the consequences of any misconduct on their part. The taking of an indemnity distinguishes that case from *Holroyd v. Breare* (g), and *Tunno v. Morris* (h). But further, there are authorities to shew that the sheriff is merely a ministerial officer of the County Court. The suitors are the judges, and not the sheriff; *Dalton on Sheriffs*; *Com. Dig.* tit. "County," (C 9).

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Byles, Serjt., (*Hugh Hill* with him,) to support the rule. The sheriff is sought to be charged in the present action for refusing to restore that which he commanded should be given up. The authority from 2 *Roll. Abr.* 552, pl. 10, is expressly in his favour, and has never been overruled. He referred also to *Cook v. Palmer* (i), and *Crowder v.*

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| (a) Latch, 187; S. C. Noy, 90. | 3 Scott, N. R. 523. |
| (b) 2 T. R. 148. | (g) 2 B. & A. 473. |
| (c) 8 A. & E. 565; See S. C. | (h) 2 C., M. & R. 298; 4 Dowl. |
| 3 N. & P. 547. | 224; See also <i>Tinsley v. Nassau</i> , |
| (d) 11 East, 25. | M. & M. 52. |
| (e) 9 Bing. 471; See S. C. 3 | (i) 6 B. & C. 739; 9 D. & R. |
| M. & Scott, 1. | 723. |
| (f) 3 M. & G. 221; See S. C. | |

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Long (a). In all the cases cited on the other side, the bailiff was acting under colour of his office, and had received no inhibition to proceed. (He was then stopped by the Court.)

TINDAL, C. J.—It appears to me that the rule to enter a verdict for the sheriff must be made absolute. The question is, whether the sheriff was shown, upon the evidence given in this case, to have been guilty of a conversion; or, in other words, whether the refusal to deliver the goods which had been seized under the writ of attachment was the conjoint act of the bailiffs and the sheriff, or of the bailiffs alone. It appears to me to have been the act of the bailiffs alone, since, at the time when the conversion took place, they were not the servants of the sheriff. The ground upon which the sheriff is made answerable for the acts of his bailiff is, that he performs a duty by another which the law requires him to perform himself. The writ of attachment and the warrant thereon did originally authorize the bailiffs to make the seizure in question; but afterwards came the supersedeas, and the effect of that was to make the writ of attachment inoperative, and also the warrant. The consequence was, that though the sheriff would have been liable for the original taking and keeping of the goods, if any thing wrong had been done prior to the supersedeas; whatever was done afterwards was done by the bailiffs of their own authority, and against the positive orders of the sheriff. The writ of supersedeas was a direct command to the bailiffs to abandon the seizure and restore the goods to Brown; and if we were to hold the sheriff responsible under such circumstances, it would be making a person liable as a wrong-doer for the acts of another, after the determination of that person's authority. The case in *Rolle's Abridgment*, which has been cited, is precisely in point, as the law is the same in this respect, whether the person or the goods of a

party be wrongfully detained. That case has never been overruled, and I see no reason why it should be. Not only on principle, therefore, but on authority, I think the verdict ought to be entered for the sheriff.

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COLTMAN, J.—I should certainly have hesitated before exempting the sheriff from liability, if it had not been for the case in *Rolle's Abridgment*; but that case is even stronger than the present, because there the process was issued from a superior Court, which the sheriff sent to his bailiff to execute. In that case, the party was bound to execute the process of the Court himself, as sheriff, and the bailiff was only his servant; but here the sheriff is not a mere ministerial officer, but issues his process to the bailiff, who is bound to execute that process. The sheriff, therefore, would not be liable for the execution of process out of the County Court, unless he accept an indemnity, which places him in a different position. After the supersedeas, however, and notice to the bailiffs, he cannot be held answerable for their tortious acts.

CRESSWELL, J.—It is not necessary in this case to deliver any opinion upon one of the points which have been raised; but there are certainly strong authorities for holding that the sheriff is a judicial officer in the County Court, and not merely a ministerial officer. The sheriff does not first receive an order from the Court, and then issue the process to his officer; but it issues in the first instance to the bailiff. If his order is not the order of the Court, the bailiff has no order at all; for it issues direct from the sheriff himself. But, as I have already said, it is not necessary to discuss that question here. It is alleged in the pleadings that the act, which is called the conversion, became such conversion by reason of a wrongful act under a supersedeas, which had previously been issued, which is in effect an allegation that the sheriff's own order to do what was right, was the reason of his doing something wrong. Another observation which

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I may make is, that the new assignment does not shew a conversion, but merely evidence of a conversion. That, however, is beside the present question. It does not appear that any doubt has ever been thrown on the propriety of the decision in *Rolle's Abridgment*, and I agree, therefore, with the rest of the Court in thinking that the rule to enter a verdict for the sheriff should be made absolute.

Rule absolute accordingly.

HUXLEY v. BULL.

In debt for goods sold, defendant pleaded that H., plaintiff's agent, had procured from defendant, and that plaintiff received, a bill of exchange for and on account of the sum of 59*l.* 17*s.* 4*d.*, parcel, &c. Replication, that H. took the bill without plaintiff's consent, knowledge, or authority; that before the commencement of the suit, and within a reasonable time, to wit, on, &c. plaintiff gave defendant notice thereof; and that afterwards, and within a reasonable time, to wit, on the day and year aforesaid, the bill was returned by the plaintiff to the defendant. Rejoinder, that H. took the bill with the plaintiff's consent, knowledge, and authority: *Held*, that the plaintiff was not entitled to judgment non obstante veredicto; as it did not appear on the face of the replication, that the bill was returned before action brought.

DEBT for goods sold and delivered, and on an account stated.

Second plea. And for a further plea in this behalf as to the sum of 59*l.* 17*s.* 4*d.* parcel of the moneys in the said declaration mentioned, and the debt and causes of action in respect thereof, the defendant saith that after the accruing of the said debt and causes of action in the said declaration mentioned, as to the said sum of 59*l.* 17*s.* 4*d.*, parcel, &c., and before the commencement of this suit, to wit, on the 13th day of December in the year of our Lord, 1843, one George Hibbert, the agent of the plaintiff in that behalf, obtained and procured from the defendant for and on account of the said sum of 59*l.* 17*s.* 4*d.*, parcel, &c., and the debt and causes of action in the said declaration mentioned in respect thereof, a certain bill of exchange in writing for the said sum of 59*l.* 17*s.* 4*d.*, bearing date a certain day and year, to wit, the day and year last aforesaid, and accepted by the defendant, and payable three months after the date thereof, (which period hath not yet elapsed) which said bill of exchange the said George Hibbert then delivered and handed over to the plaintiff,

and the plaintiff then, before the commencement of this suit, to wit, on the day and year last aforesaid, took and received the same for and on account of the said sum of 59*l.* 17*s.* 4*d.*, parcel, &c., as aforesaid, and the debt and causes of action in the said declaration mentioned in respect thereof. Verification.

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Replication. As to the plea of the defendant by him secondly above pleaded, the plaintiff says, that the said George Hibbert took and received the said bill from the defendant without the consent or knowledge of the plaintiff, and without any authority from the plaintiff in that behalf; and that afterwards, and before the commencement of this suit, and within a reasonable time in that behalf, to wit, on the 13th day of December, in the year of our Lord, 1843, the plaintiff caused notice of the premises to be, and notice of the premises was then given to and received by the defendant; and that afterwards, and within a reasonable time in that behalf, to wit, on the day and year aforesaid, the said bill was returned by the plaintiff to the defendant. Verification.

Rejoinder. That the said George Hibbert took and received the said bill in the said last plea mentioned from the defendant, with the consent, knowledge, and authority of the plaintiff, in manner and form, &c. Issue thereon.

The cause was tried before Lord *Denman*, C. J., at the last Surrey Assizes, when the defendant obtained a verdict. A rule nisi for a new trial was obtained by Sir *T. Wilde*, Serjt., in Easter Term, on the ground that the verdict was against evidence, or for judgment on the second plea, non obstante veredicto. He cited *Kearslake v. Morgan* (a), *Crisp v. Griffiths* (b), *Simon v. Lloyd* (c), *Mercer v. Cheese* (d).

Talfourd, Serjt., now shewed cause. First, as to that part of the rule which relates to judgment non obstante

(a) 5 T. R. 513.

3 Dowl 813.

(b) 2 C., M. & R. 159; S. C.
3 Dowl. 752.

(d) 2 Dowl. 619, N. S.; See
S. C. 5 Scott, N. R. 664; 4 M.

(c) 2 C., M. & R. 187; S. C. & G. 804.

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veredicto. The principle is now established, that it is a good plea to an action of debt on a simple contract, that a bill of exchange has been handed over by the debtor to the creditor, and taken by him on account of the debt. *Kearslake v. Morgan* (a), and *Mercer v. Cheese* (b), are strong authorities in favour of the defendant. It is submitted, therefore, that the plea is good. At all events, an immaterial issue has been taken by the replication, and therefore the Court will not give judgment non obstante veredicto, but will award a replender. Secondly, the jury drew a correct conclusion from the evidence.

Byles, Serjt., (*Lush* was with him) in support of the rule. If the verdict stands, there will be error on the record. The replication says, that Hibbert took the bill from the defendant, without the consent, or knowledge, or authority of the plaintiff, who gave the defendant notice thereof within a reasonable time, and before the commencement of the suit, and that afterwards, and within a reasonable time, to wit, on the day and year aforesaid, the said bill was returned by the plaintiff to the defendant. The rejoinder does not traverse the return of the bill, but takes issue on the want of authority. Assuming it to be a sufficient *prima facie* answer to say, "I gave you a bill for and on account of your debt;" it appears, upon this record, that the bill was returned. [*Tindal*, C. J.—Ought it not to appear that the bill was returned before action brought?] In *Mercer v. Cheese*, the decision of the Court proceeded upon the ground that the defendant could not know what had become of the bill; but here it is admitted by the pleadings, that it was returned to him. That allegation must be taken to mean that it was returned some day before the commencement of the suit. [*Tindal*, C. J.—The plaintiff does not say so.]

TINDAL, C. J.—I think this is not a case for judgment non obstante veredicto; since, for all that appears upon this

(a) 5 T. R. 513.

S. C. 5 Scott, N. R. 664; 4 M. &

(b) 2 Dowl. 619, N. S.; See G. 804.

record, the plaintiff may have only returned the bill when he replied. I confess, however, that the verdict seems to me to have been wrong, and therefore, the rule for a new trial must be absolute, without costs.

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Rule accordingly.

HARVEY v. WATSON.

BYLES, Serjt., shewed cause against a rule nisi, which had been obtained by *Dowling*, Serjt., for leave to add a plea. The action was in trespass for criminal conversation with the plaintiff's wife. The defendant pleaded not guilty. The plea proposed to be added was the following: "that before, and at the time of the committing of the trespass, the plaintiff had relinquished and renounced the comfort and fellowship of his wife, and had finally separated himself by deed from, and was living apart from her." It is submitted, that this plea ought not to be allowed. There is no precedent of such a plea having been placed upon record. It is true that in *Weedon v. Timbrell* (a), the Court of King's Bench upheld Lord *Kenyon's* ruling at Nisi Prius, that a separation between husband and wife is a bar to an action brought for any subsequent act of adultery; but in *Chambers v. Caulfield* (b), Lord *Ellenborough* is reported to have said, that he did not consider the question as concluded by the case of *Weedon v. Timbrell* (c). [*Maule*, J., referred to *Winter v. Henn* (d).]

In trespass for crim. con., the Court allowed the defendant to add a plea "that the plaintiff, at the time of the trespass, had renounced the comfort and fellowship of his wife, and had finally separated himself by deed from, and was living apart from her."

Dowling, Serjt., contra, argued, that it was not necessary to contend, that the plea would stand the test of a demurrer. The decision in *Weedon v. Timbrell* had never been overruled, and it was, therefore, enough that the plea set up a

(a) 5 T. R. 357.

(b) 6 East, 248.

(c) 5 T. R. 357.

(d) 4 C. & P. 498.

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different defence to that which could be given in evidence under the general issue.

TINDAL, C. J.—It is too much to say upon motion, after the judgment of the Court of King's Bench in *Weedon v. Timbrell* (a), that the plea is bad. The defendant must, therefore, have leave to add the plea in question.

Rule absolute.

(a) 5 T. R. 357.

COURT OF EXCHEQUER.

Michaelmas Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

DE WOLF and Another, Assignees, &c., v. BEVAN
and Another (a).

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TROVER by the assignees of K. McLeod and J. B. Wood, bankrupts. The first count stated, that the bankrupts, before their bankruptcy, were possessed of one thousand puncheons of brandy, fifty puncheons, fifty kegs, &c., and alleged a conversion after the bankruptcy.

The defendants pleaded as to five puncheons of brandy, and five puncheons, parcel, &c., that before the said K. L. & J. W. were possessed thereof as in the declaration mentioned, the defendants held, and were possessed of, the said brandy and puncheons, as the warehousemen and agents of certain persons, of whom the said K. L. & J. W. purchased the same; that K. L. & J. W., before they became bankrupts, purchased the same brandy and puncheons, under and by virtue of a certain contract of purchase, then made and entered into between them and certain other persons carrying on business by and under the name, style, and firm of Messrs. Falk, Brothers, whose Christian names are to the defendants unknown, and by

To trover by the assignees of L. & W., bankrupts, for certain puncheons of brandy, the defendants pleaded, that the bankrupts purchased the brandy of F., and were to pay for the same by a bill of exchange; that defendants, before the bankruptcy, had possession of the brandy as the agents of L. & W.; that the bill being dishonoured, it was agreed that L. & W. should deliver the brandy to F. in satisfaction of the bill. It then averred a

(a) This case was decided in Trinity Term last. re-delivery of the brandy, and acceptance of it by F. in satisfaction, and that before the defendants or F. had any knowledge of the bankruptcy, the brandy became the property of F., by re-delivery by defendants, by authority of L. & W. Replication, that it was not agreed as in the plea mentioned, nor was the brandy re-delivered or accepted in satisfaction, nor did the property in the brandy revert to F. by re-delivery, by authority of L. & W., before they became bankrupt.

Special demurrer for duplicity, alleging that the replication put in issue two particulars, viz. the agreement, and its performance by re-delivery of the brandy: *Held*, that the replication was bad for duplicity.

A party can only avail himself of the grounds of duplicity specially stated.

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which said contract, the said K. L. & J. W. were to purchase of, and pay the said F. & Co., for the same brandy and puncheons, a certain sum of money as the price and value of the said brandy and puncheons, to wit, the sum of 78*l.* 11*s.* 4*d.*, to be secured by a certain acceptance by them, the said K. L. & J. W., of a certain bill of exchange drawn on them by the said F. & Co., payable at a certain time after date, to wit, four months; that K. L. and J. W. did purchase and pay for the same brandy and puncheons in manner aforesaid; that afterwards, from the time of such purchase as aforesaid, continually up to, and until the re-transfer of the same brandy and puncheons to the said F. & Co., as hereinafter mentioned, the defendants held and were possessed of, and had the custody and control of the same brandy and puncheons, as the warehousemen and agents of and for the said K. L. & J. W., which was their possession in the declaration mentioned; that afterwards, and before the said K. L. & J. W. became bankrupts, the said bill of exchange so given in payment, became and was due and payable according to its tenor and effect; that K. L. & J. W. being then unable to meet or pay the said bill, the same then being and remaining in the hands of F. & Co., unpaid and dishonoured, and the said last mentioned persons then pressing for payment thereof, and then threatening to take proceedings against K. L. & J. W., to compel payment thereof, it was then thereupon agreed by and between F. & Co., and K. L. & J. W., in consideration of the premises, and that F. & Co. would then forbear to take proceedings against the said K. L. & J. W., to compel payment of the said bill of exchange, and that F. & Co. would abandon and relinquish all claim and demand upon the said bill of exchange, and would accept the said brandy and puncheons last mentioned, in satisfaction and discharge of the said bill of exchange, and of all cause and right of action thereon, that K. L. & J. W. should return, re-transfer, and re-deliver the same brandy and puncheons to F. & Co., (avermment of notice and assent to the return,

re-transfer, and re-delivery of the brandy and puncheons;) that afterwards, and before the defendants, or F. & Co., or either of them, had any knowledge or notice of any fiat in bankruptcy issued against K. L. & J. W., or either of them, or of any act of bankruptcy by them or either of them committed; and before either of them had become bankrupt, the same brandy and puncheons, and every part thereof, was and were accordingly returned, re-transferred, and re-delivered to F. & Co., and the same was and were then accepted by them in such satisfaction and discharge of the said bill of exchange, and they then thereupon abandoned and relinquished all claim and demand thereupon; that all property and interest in the same brandy and puncheons, then and before the defendants, or F. & Co., or either of them respectively, had any knowledge or notice that any fiat in bankruptcy had issued against K. L. & J. W., or either of them, or that any act of bankruptcy had been committed by them, or either of them, and before either of them had become bankrupt, reverted in, and became the property in possession of F. & Co., to wit, by means of a re-delivery thereof to them by the defendants, under and by virtue of the authority of K. L. & J. W. to the defendants given in that behalf, before any act of bankruptcy by K. L. & J. W., or either of them committed; that afterwards, and after the said K. L. & J. W. became bankrupts, the plaintiffs, as such assignees, applied to and requested the defendants to deliver up to them, the plaintiffs, as such assignees, the same brandy and puncheons which the defendants then, and for the cause in this plea aforesaid, wholly refused to do, as they lawfully might, for the cause aforesaid, which is the conversion in the said first count mentioned, and complained of. Verification.

Replication; that it was not agreed by and between F. & Co., and K. L. & J. W., as in the said plea mentioned, nor were the said brandy or puncheons in said plea mentioned, returned, re-transferred, or re-delivered, or accepted in satisfaction or discharge, as in the said plea

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mentioned, in manner and form as in that plea alleged; nor did the property and interest in the brandy and puncheons, before the defendants, or F. & Co., or either of them, had knowledge or notice that a fiat had issued against K. L. & J. W., or that an act of bankruptcy had been committed, revert in, or become the property, and in possession of F. & Co., by means of a re-delivery thereof to them by the defendants, under and by virtue of the authority of K. L. & J. W., before any act of bankruptcy, modo et formâ.

Special demurrer, assigning for cause, (amongst others,) that the replication is double and multifarious, inasmuch as it contains two several and distinct answers, that is to say, the one a denial of the said alleged agreement; the other, a denial of the alleged performance of it.

W. H. Watson, in support of the demurrer, contended, that the replication put in issue three distinct facts, viz., the agreement, its performance, and the re-delivery of the brandy, &c., by authority of the bankrupt.

Crompton, contra, argued, that the demurrer only pointed at the objection that two facts were put in issue by the replication; and that those facts amounted to one single matter of defence, and were, therefore, traversable. He cited *Bell v. Tuckett* (a), *Robinson v. Rayley* (b), *O'Brien v. Saxon* (c), *Webb v. Weatherby* (d), *Bennison v. Thelwell* (e), *Pigeon v. Osborn* (f), *Reynolds v. Blackburn* (g), *Garten v. Robinson* (h), *Eden v. Turtle* (i).

Cur. adv. vult.

(a) 3 M. & G. 785; 1 Dowl. 458, N. S.; See S. C. 4 Scott, N. R. 402.

(b) 1 Burr. 316.

(c) 2 B. & C. 908; See S. C. 4 D. & R. 579.

(d) 1 Scott, 477; S. C. 1 Bing. N. C. 502.

(e) 9 Dowl. 739; See S. C.

7 M. & W. 512.

(f) 4 P. & D. 345; See S. C. 12 A. & E. 715; 9 Dowl. 507.

(g) 7 A. & E. 161; See S. C. 2 N. & P. 136; 6 Dowl. 19.

(h) 2 Dowl. 41, N. S.

(i) 2 Dowl. 459, N. S.; See S. C. 10 M. & W. 635.

The judgment of the Court was delivered by

POLLOCK, C. B.—The demurrer in this case was argued before my Brothers *Parke*, *Alderson*, *Rolfe*, and myself, during the last Term. (His Lordship stated the pleadings.) Two objections were made to the replication; the first is of importance, and if decided for the defendants, it is unnecessary to consider the other. The objection is, that the traverse in the replication was multifarious and put in issue three distinct matters: first, the agreement between the bankrupts and Falk, Brothers; secondly, its performance by re-delivery pursuant to the agreement; and thirdly, a re-delivery by authority of the bankrupt notified to the defendants, which would prevent the goods passing to the assignees, as being in the apparent ownership of the bankrupts. It was answered in the first place, and we think properly answered, that the special demurrer objected to the replication as containing two answers, the denial of the agreement, and of the performance of it, and not three; and that the defendants can only avail themselves of the grounds of objections for duplicity or multifariousness specially stated; *Smith v. Clinch* (a). The question then is, whether the plaintiff can deny by one traverse, the agreement by Falk & Co. to give up the claim on the bill against the bankrupts, and receive back the goods in satisfaction of that claim; and also the performance of the agreement by the re-delivery and acceptance in satisfaction and discharge of that claim? The rule laid down by Lord *Coke*, *Co. Litt.* 126, a, is, that a special issue must be taken on one material point, and in applying the rule, the Courts have held, that a plaintiff is not confined to a single fact, but may include several, constituting one point of the defence; as in *Robinson v. Rayley* (b), *Bennison v. Thelwell* (c), *Pigeon v. Osborn* (d), and lastly, the case of *Bell v. Tuckett* (e), in which it was decided, on the authority of the other cases, that where the defendant pleaded a release by one who

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(a) 2 G. & D. 225; See S. C.
2 Q. B. 835.
(b) 1 Burr. 316.

(c) 7 M. & W. 512.
(d) 4 P. & D. 345.
(e) 3 M. & G. 785.

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executed as an agent of the plaintiff, on behalf of the plaintiff, and who was duly authorized so to do by the plaintiff, the plaintiff might include in his traverse the execution by the agent, and his authority to execute; those two facts, constituting one ground or point of defence. My Brother *Maule* truly says (a), that there is some nicety and difficulty where several facts are pleaded, in saying whether they come under this description or not; and we have had considerable doubt in the present case. A point of defence is clearly not to be confounded with the whole defence contained in the plea; otherwise there would be no distinction as to the cases in which a general traverse is allowable, and upon which nice questions have arisen; and a plaintiff might, in all cases, deny the whole plea, though it consisted not of mere matter of excuse only, but of title or authority derived from the plaintiff. A plea, may indeed comprise a single point of defence only, but it may also comprise several points. Thus, a plea of release, or money paid in satisfaction, or license, may be considered as including one point of defence only; a plea of right of common in the old form comprises several, viz., a seisin in fee of the land in respect of which the right is claimed, a prescriptive right for certain cattle, and the putting on those cattle. All that the Court did in *Robinson v. Rayley* (b), was to decide, that the last part of such a plea formed one point of defence; though it was capable, in that case, of being subdivided into three distinct facts, viz., the ownership of the cattle, their being commonable, and levant and couchant. In some cases of common, as, for instance, for a certain number of horses, it would consist of one fact only. Had there been a replication in that case, putting in issue the whole defence, whether in the form of *de injuriâ*, &c., or a denial of all the matters in the plea, it would have been clearly bad. We have then to decide in the present case, whether the agreement between Falk, Brothers, and the bankrupt, and the performance of it on

(a) In *Bell v. Tuckett*, 3 M. & G. 805.

(b) 1 Burr. 316.

both sides, constitute one point of the defence or two, and after some hesitation, we have come to the conclusion that they constitute two. The averment bears a close analogy to the plea of accord and satisfaction in the old form, disapproved of by Lord Coke in *Pinnel's case* (a), the replication to which plea in the book of entries, traverses one part only of the allegations, *Rastall's Entries*, 627, a; and we cannot find any case in which both have been denied together. That of *Webb v. Weatherby* (b), where it was pleaded that the defendant paid, and plaintiff received, a sum in satisfaction, was decided on the ground that a denial of acceptance in satisfaction, would virtually imply a denial of payment, and, consequently, there was no objection to an express denial of both; and the Lord Chief Justice distinctly said, it is not a case of accord and satisfaction, and, therefore, at least, no authority for the denial of both those facts in such a plea by one traverse. A case was cited, decided by my Brother *Wightman*, *Garten v. Robinson* (c), as an authority that where a plaintiff might traverse all the facts in the plea by the general replication, he might confine himself to some of them; and so the traverse in this case, it was argued, might be supported, though it included two facts. It is a sufficient answer to say, that here the plaintiff could not have traversed all the allegations in the plea, because it contained matter of title to the goods, and, therefore, the traversing of two facts could not, on this ground, be supported.

We are of opinion, therefore, that the replication is bad, and that the first objection must prevail; and it becomes, therefore, unnecessary to consider the second.

The plaintiff may, however, amend, on payment of costs, if he should be able to do so.

Judgment for the Defendants (d).

(a) 5 Rep. 117, a.

(b) 1 Bing. N. C. 502

(c) 2 Dowl. 41, N. S.

(d) See *Bonzi and Another v. Stewart*, ante, p. 258.

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WORTH v. TERRINGTON and Others.

A declaration in trespass alleged that the defendants, on a certain day, assaulted the plaintiff, and imprisoned him, and kept and detained him so imprisoned for a long time, to wit, for the space of twenty-four hours. The defendants pleaded, "as to the said imprisoning the plaintiff, and keeping and detaining him in prison," that plaintiff made a disturbance in and outside a church during divine service, and committed a breach of the peace; and in order to prevent such disturbance, and preserve the peace, the defendants "did a little imprison the plaintiff, and keep and detain him imprisoned for a reasonable time in that behalf, to wit, until he ceased such disturbance and breach of the peace, to wit, for the space of two hours."

The plaintiff replied *de injuria*, and also new assigned that the defendants imprisoned him after he ceased the disturbance and breach of the peace: *Held*, on special demurrer, that the replication and new assignment were not double.

TRESPASS. The first count of the declaration stated that the defendants, on the 28th day of January, A. D. 1844, with force and arms, &c., assaulted and beat the plaintiff, and then seized and laid hold of him, and with great force and violence pulled and dragged him about, and gave and struck him a great many violent blows and strokes on divers parts of his body, and then forced and compelled him to go from and out of a certain clerk's desk in a certain church, situate, &c., unto and into the aisle of the said church, and then forcibly and violently dragged and pulled him in and along the said aisle, and from and out of the said church, and then imprisoned the plaintiff in the custody of the defendants, F. and C., they the said F. and C. then being common constables and peace officers, and kept and detained him, the plaintiff, so imprisoned in such custody as aforesaid, without any reasonable or probable cause whatsoever, for a long time, to wit, for the space of twenty-four hours then next following, contrary to law, and against the will of the plaintiff, &c.

The defendants pleaded, secondly, except as to imprisoning the plaintiff and keeping and detaining him in prison and in custody, that the plaintiff contemptuously came into the said church during divine service, and disturbed the congregation, by wrongfully getting into the clerk's desk, and by then making loud noises, and conducting himself in an irreverent and unbecoming manner; that the defendant T., then being one of the churchwardens, requested the plaintiff to cease such disturbance, which the plaintiff wholly refused to do, whereupon T., as such churchwarden, and B. as rector, and the other defendants in their aid, for the purpose of preserving decorum in the said church,

gently laid hands on the plaintiff, and compelled him to go out of the clerk's desk, &c.

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Thirdly: as to the said imprisoning of the plaintiff, and keeping and detaining him imprisoned and in custody; that the plaintiff having so irreverently and improperly conducted himself as in the last plea mentioned, and having been so removed from and out of the said church as therein mentioned; and being in the porch thereof, the celebration of divine service still continuing, then threatened to return, and would have returned into the said church to renew, and would have renewed such noises and indecent and irreverent conduct as aforesaid, to the great scandal, disturbance, and annoyance of the said congregation; and then stayed and continued outside and at the door of the said church, threatening to return as aforesaid and renew such improper conduct; and made a great noise and disturbance at and outside the said church; and resisted and opposed, and struggled and contended with, the said constables in the discharge of their duty, and laid hands on them in breach of the peace of our Lady the Queen, to the great disturbance of the said congregation; whereupon the defendants F. and C., so being such constables and peace officers, and there seeing and having view of such breach of the peace by the direction and on the charge of the other defendants, and the other defendants so directing and charging as aforesaid to preserve the peace, and to prevent the plaintiff from returning into the said church, and renewing such noises and indecent and irreverent conduct as aforesaid, and to prevent such noise and disturbance at and outside the church, and because they could not otherwise preserve the peace, did then a little imprison the plaintiff, and keep and detain him imprisoned and in custody for a reasonable space of time in that behalf, to wit, until he ceased and discontinued such disturbance and breach of the peace as aforesaid, to wit, for the space of two hours, as they lawfully might for the cause aforesaid; quæ sunt eadem, etc.

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Replication, and new assignment. As to the plea of the defendants above pleaded, as to the imprisoning of the plaintiff, and keeping and detaining him imprisoned and in custody, *de injuriâ*, &c. And the plaintiff further saith, that he sued out his writ and declared thereon, not only for the said imprisoning him, and keeping and detaining him in prison for the said alleged space of time, to wit, two hours, part of the said time in the declaration and plea mentioned, and by that plea attempted to be justified; but also for that the defendants, after the expiration of the said alleged reasonable space of time for the defendants to imprison, or keep and detain the plaintiff imprisoned and in custody, for the cause in the said plea mentioned; and after the celebration of divine service had ceased, and after the plaintiff had ceased and discontinued the said alleged threatening to return, or could or would have returned into the said church to renew, or could or would have renewed the said alleged noises, and indecent and irreverent, and improper conduct, and after he had ceased and discontinued staying and continuing outside and at the door of the said church, and making the said alleged noise and disturbance at or outside the said church, and after he had ceased the said alleged resisting, opposing, and struggling and contending with the said constables, and laying hands on them in the discharge of their duty, and disturbing the said congregation, to wit, at the said time when, &c., with force and arms, &c., continued to imprison the plaintiff, and kept and detained him in prison, without any reasonable or probable cause whatsoever, for a long time, to wit, for the space of twenty-two hours, residue of the said time in the said count mentioned, contrary to the laws and against the will of the plaintiff, (*modo et formâ*), which said imprisoning, and keeping and detaining in prison above newly assigned, is another and different part of the said imprisoning and keeping and detaining the plaintiff in prison in the said count mentioned, than the said part thereof in the introductory part of the said plea mentioned, and therein attempted to be justified. Wherefore, &c.

Special demurrer to the replication and new assignment, assigning for causes that they are double in this: that they deny any cause for any imprisoning, and also allege that such imprisoning was longer and other than warranted by the alleged cause: and also for that they are repugnant in this, that the traverse in the replication denies the existence of any cause of imprisonment, while the new assignment admits the same.

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Bramwell, in support of the demurrer. The replication and new assignment are a double pleading. The declaration states but one imprisoning, and the plea justifies the whole, though it mentions two hours. If the plaintiff had merely replied *de injuriâ*, and had succeeded on that issue, he might have recovered damages for the whole cause of action. The introductory part of the plea does not, in terms, limit the time alleged in the declaration, and if it be construed as so doing, it would be bad, as an indirect denial that the imprisonment continued for the length of time mentioned in the declaration. The plea and declaration taken together are in substance this: the plaintiff complains of an imprisonment for a certain time; the defendants say it is true that you were imprisoned for a certain time, but there were reasons which justified us. The plaintiff replies that there was no such cause, and, in addition to that, new assigns. In a note to the case of *Thomas v. Marsh* (a), it is said that *Parke*, B., expressed an opinion that such a form of pleading was demurrable. [*Parke*, B.—The defendants say, “We were justified in imprisoning you for a reasonable time;” the plaintiff says, “I deny that, and I also go for a further time. Is not time equally divisible as space?”] If the declaration complained of an imprisonment on the 1st of January, 1844, and the plea justified an imprisonment on that day, the plaintiff could not traverse the plea, and also new assign. Here the defendants, by their plea, in substance say, “We

(a) 5 C. & P 597, note (a).

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imprisoned you for a reasonable time;" the replication and new assignment amount to this: "there was no excuse for the imprisonment for such time, and, if there were, you kept me an unreasonable time." [Parke, B.—If the time were unreasonable, in what way is the plaintiff to take advantage of that. Suppose, for instance, the imprisonment were for a year, and the real cause only justified a day?] In that case the plaintiff should new assign only. The case of *Monprivatt v. Smith* (a), shews that this pleading is double. There to trespass for breaking and entering a house, and staying therein *three weeks*; the defendant pleaded a justification as to breaking and entering, and staying in the house *twenty-four hours*, and Lord *Ellenborough* ruled that the plea covered the whole declaration. The object and effect of a new assignment are clearly explained in the note to *Greene v. Jones* (b). [Pollock, C. B.—Suppose a person is imprisoned under the warrant of a commissioner of bankrupts, and after the messenger has kept him in custody for two days, it is discovered that the warrant is illegal, and the commissioner directs him to be discharged. The messenger, however, insists upon detaining him in custody until the next meeting, and an action is brought, founded on the whole imprisonment, to which the messenger pleads the warrant, is it not competent for the plaintiff to reply de injuriâ, and also new assign the additional time?] That would depend upon the form of the plea. If it admitted the imprisonment for two days under the warrant, the plaintiff might reply to that, and new assign the additional time; but not if the plea professed to justify the whole time. [Parke, B.—This point was expressly decided a short time ago in the case of *Loweth v. Smith* (c). *Cheasley v. Barnes* (d) decided, that where the plaintiff complains of a single act of trespass in each count, each of which is justified by the defendant in his several pleas, the plaintiff cannot in his replication take issue upon the facts of such justification,

(a) 2 Campb. 175.

(b) 1 Wms. Saund. 299, b.

(c) *Ante*, p. 212.

(d) 10 East, 73.

and also new assign either the same or different matters, such replication and new assignment being double. This pleading is also repugnant; it denies that there was any excuse for the imprisonment, and then, by the new assignment, admits that there was a justifiable cause.

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Cowling, contra, was not called upon by the Court.

POLLOCK, C. B.—The case of *Loweth v. Smith* is directly in point, so far as that authority is binding. In the first instance the Court entertained some doubt, but upon further consideration, the case is perfectly clear. The substance of the plea is an attempt to confine the plaintiff to a reasonable time. The plaintiff says, “you are mistaken in supposing that I am merely going for an imprisonment during a reasonable time; I am going for an imprisonment beyond that time, and, therefore, I have a right to reply de injuriâ as to the reasonable time, and to new assign the excess.”

PARKE, B.—I am of the same opinion. Time is quite as divisible as space. The nature of the defence is, that the defendants had a right to keep the plaintiff in prison for a certain time. That is *primâ facie* an answer to the declaration, for the defendants are not supposed to know for what time the plaintiff is going. The plaintiff says, “I deny that you had any cause for keeping me in prison, and, supposing you had, you have imprisoned me for a longer time than would have done.” That is no extension of the complaint alleged in the declaration. The plea is, that the defendants were justified in detaining the plaintiff in custody for a certain length of time: the plaintiff says, “I go for a length of time much beyond that.” It is similar to a plea of justification of a right of way; in which case the plaintiff may reply that there was no such right, and also that the defendant trespassed on another part of the close.

Judgment for the Plaintiff.

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A declaration stated that an action was depending at the suit of the plaintiffs against D; that D. was arrested and in custody of the sheriff by virtue of a *capias* duly issued in the action by order of a Judge, and indorsed for bail for 69*l*.; that costs and charges had been incurred by the plaintiffs in the prosecution of the said action; and that thereupon, in consideration that plaintiffs would discharge D. out of custody, the defendant promised to pay the plaintiffs the debt, interest, and costs in the action against D. Averment, that plaintiffs discharged D. Breach, non-payment.

Plea, that there was not any claim or demand, or cause of action, against D. in respect of which the plaintiffs could or were entitled to recover in the action; that plaintiffs,

by discharging D., did not give up or part with any available remedy, as the plaintiffs then well knew; that the arrest and proceedings were colourable only, and were not commenced for the purpose of trying any doubtful or contested question of fact: *Held*, on special demurrer to the plea, that the declaration disclosed a sufficient consideration; and that the plea was no answer, as it did not shew that the arrest was fraudulent or illegal.

ASSUMPSIT. The declaration stated, that before and at the time of the making of the promise, &c., an action had been commenced, and was depending at the suit of the plaintiffs, against one Dunlop, in the Court of our Lady the Queen, &c., for the recovery of the sum of 83*l*. 6*s*. 11*d*.; that Dunlop, after the commencement of the said action, and whilst the same was so depending, was about to leave England and proceed to parts beyond the seas, to wit, to Halifax, in North America; that Dunlop had been arrested, and was then in custody of the sheriff of Lancashire, at the suit of the plaintiffs, under and by virtue of a writ of *capias* duly issued in the said action, according to the statute in that case made and provided, and directed to the chancellor of the county palatine of Lancaster, or his deputy there, and of a certain mandate duly issued by the said chancellor on the said writ of *capias*, and directed to the said sheriff of Lancashire, and which said writ of *capias* and mandate respectively, in pursuance of an order of *Gurney, B.*, bearing date, &c., were each of them duly marked and indorsed for bail for the sum of 69*l*.; that costs and charges, to the amount of 20*l*., at the time of the making of the said promise, had been incurred by the plaintiffs in and about the prosecution of the said action, and the arrest of the said Dunlop, and thereupon heretofore, to wit, on, &c., in consideration that the plaintiffs, at the request of the defendant, would discharge the said Dunlop out of the custody of the sheriff of Lancashire, as to the said action, the defendant undertook and promised the plaintiffs to pay to them the sum of 88*l*., for the debt, interest, costs, and charges of the plaintiffs in the said action, brought by the plaintiffs against the said Dunlop, when the defendant

should be thereunto requested; that plaintiffs, confiding in the promise of the defendant, did then discharge Dunlop out of the custody of the said sheriff, as to the said action; (averment of notice and request to pay 88*l.*, for debt, interest, and costs.) Breach, non-payment.

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Plea; that Dunlop was sued, arrested, and detained in custody, until his discharge from custody, by the procurement of the plaintiffs; that there was not, at the time of commencing the said action against Dunlop, nor during the time of prosecution thereof, or any part of the said time, nor at the time of arresting Dunlop, nor during any part of the time in which he was detained in custody, nor at the time of making the promise by the defendant, any claim or demand, or cause of action against Dunlop, in respect whereof the plaintiffs could or were entitled to recover in the said action against Dunlop, the sum which the defendant so promised to pay, or any other sum or sums, matter or thing; and the plaintiffs did not, by discharging the said Dunlop from custody, give up or part with any available remedy against Dunlop, as the plaintiffs, at the time of commencing and prosecuting the said action against Dunlop, and at the time of procuring his arrest, and of his being arrested and detained in custody, and at the time of the promise of the defendant, well knew, but which the defendant, at the time of his said promise, did not know; that the said writ, and the said arrest and detainer in custody, and proceedings in the said action, were, on the part of the plaintiffs, colourable only, and the same were not procured, commenced, or prosecuted by the plaintiffs for the purpose, or with the intent of trying any doubtful or contested question of law or fact.

Special demurrer and joinder. The plaintiffs' points for argument were, that the consideration alleged is the discharge of Dunlop out of custody at the request of the defendant, which discharge was a benefit to Dunlop, which he could not have obtained without the act of the plaintiffs in giving the discharge to the sheriff, whether the plaintiffs

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could have proved their debt against Dunlop or not, and which discharge materially altered the situation of the plaintiffs, by allowing Dunlop to leave the kingdom; and, therefore, the question as to whether there was another and wholly distinct consideration is not material; that the plea is an argumentative denial of there being any consideration for the promise; that the plea is double, in alleging that there was no debt due from Dunlop, and also, that the arrest was colourable.

The defendant's points for argument were, that the declaration is insufficient and bad; that it does not disclose any sufficient consideration to support the action; that it is not alleged that there was a good cause of action or a doubtful claim on which the action mentioned in the declaration was founded, or that the plaintiffs had any right to continue Dunlop in custody; and that it is not shewn that the plaintiffs sustained any damage by his discharge from custody.

Crompton, in support of the demurrer. The plea is bad in substance and in form. The declaration shews, upon the face of it, a good consideration to support the promise. Even supposing that no debt was due, and that the plaintiffs were aware of that fact, still the consideration is sufficient, for Dunlop was in custody under regular process, and had no right to his discharge. It does not appear that the arrest was illegal; it is, indeed, alleged that it was "colourable," but that word has no distinct or definite meaning, and the declaration shews, that the arrest was duly obtained by order of a Judge, and that the proceedings were in fieri. It is difficult to understand what is intended by the word "colourable." In *Longridge v. Dorville* (a), the giving up of a suit intended to try a question, respecting which the law is doubtful, was held to be a good consideration for a promise to pay a stipulated sum, and the reason is, that the

(a) 5 B. & A. 117.

plaintiff relinquishes a benefit which he might otherwise have had. Here there was a positive benefit to Dunlop by his immediate discharge from prison, which the defendant could not have obtained, except by procuring bail. As bail was dispensed with by this act of the plaintiffs, this is not a mere case of forbearance, but an act done by the plaintiffs at the defendant's request, which was a benefit to him or his friend. The sum for which the party was arrested being less than that agreed to be paid, is quite immaterial. The plea discloses no ground of duress or fraud. In *Butcher v. Stewart* (a), the writ was irregular, and yet the discharge from execution was held a sufficient consideration for a promise to pay a sum of money. And in *Edwards v. Baugh* (b), Lord Abinger said, "Where an action is depending, the forbearing to prosecute it, is a sufficient consideration for a promise to pay a certain sum of money."

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Peacock, contra. The declaration contains no allegation that the plaintiffs had a good cause of action or even a doubtful claim against Dunlop, or that they had any right to detain Dunlop in custody. It states only "that an action had been commenced and was depending for the recovery of a certain sum of money, and that Dunlop, being about to leave England, had been arrested, and was in custody of the sheriff, under a writ of capias duly issued in that action." The word "duly" only means in due form, and not rightfully; that was so decided in *Butcher v. Stewart* (c). The consideration stated is not a forbearance to sue; it is a mere discharge out of the sheriff's custody, and it does not even appear that the discharge was without bail. The promise alleged in the declaration is, to pay a sum of money for the debt of Dunlop, but it does not appear that any debt was due from him, and the plea expressly avers, "that there was not any claim or demand or cause of

(a) 1 Dowl. 620, N. S.; S. C. 11 M. & W. 641.
9 M. & W. 405.

(c) 1 Dowl. 620, N. S.; S. C.
9 M. & W. 405.

(b) *Ante*, Vol. 1, p. 307; S. C.

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action against him, in respect of which the plaintiffs could or were entitled to recover." The plea shews that there was no colour or pretence for the arrest, and that the plaintiffs well knew that they did not part with any available remedy. If a party, knowing he has no ground of action, cause another to be arrested, his discharge is no consideration for a promise by a third party to pay a sum of money. It is not every benefit that will form a good consideration: if a man is illegally in custody, the law will not regard his discharge as any benefit to support a promise. Here it appears that Dunlop was released from custody, when in fact, the plaintiffs were not entitled to detain him. If a landlord were about to make an excessive distress, it might be a benefit to the party distrained upon, that a reasonable distress only should be taken; but the landlord agreeing to take only a reasonable distress, would be no consideration for a promise by the tenant or a third party to pay the money. So it may be, in one sense, a great benefit not to be driven to a Court of law or equity for relief against an unlawful or inequitable act; yet the abstaining from committing such act would not be any consideration for a promise to pay a sum of money. The not committing waste by a party not entitled to do so, would form no consideration for a promise, either by the party entitled to sue for waste, or by a third party; unless, perhaps, if it were doubtful whether the act were waste or not, or whether the party about to do the act, were or were not entitled to commit waste. Here the plea expressly avers, that the action was not prosecuted with the intention of trying any doubtful question either of fact or of law, as in the case of *Longridge v. Dorville* (a), which is, therefore, distinguishable. There was no loss to the plaintiffs if they could recover nothing, and there was no benefit in law to Dunlop, because, being wrongfully detained, the law supposes he would obtain compensation. In the case of *Atkinson v. Settrec* (b), it was

(a) 5 B. & A. 117.

(b) Willes, 482.

held, that if a person be illegally sued by another for a debt, a promise by a third person to pay the debt claimed is void. Where a plaintiff discharges one of two joint debtors, a promise by a third person to pay the debt, in order to obtain the discharge of the defendant in custody, is void for want of consideration; *Herring v. Dorell* (a). In declaring on a promise to pay the debt of a third person, in consideration of forbearance, it is necessary to state a demand reasonable at law or in equity; *Barrell v. Trussell* (b). So in an action against the sheriff for the escape of a prisoner, on mesne process, a debt must be stated and proved to have been due; *Alexander v. Macauley* (c). In *Duke de Cadaval v. Collins* (d), it was held, that money paid under compulsion of colourable legal process, might be recovered back. It is contrary to the policy of the law, that a man should make use of the process of a Court of law for purposes of extortion.

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Crompton, in reply. This is not a promise to pay the debt of Dunlop, but a promise to pay a sum of money in consideration of his discharge. The plaintiffs, in releasing Dunlop, did an act which the defendant could not call upon them to do; and the contract between them was, that the plaintiffs should discharge Dunlop, and that the defendant should, for that act, give a sum of money. For aught that appears, the plaintiffs might have had a *bonâ fide* claim against Dunlop, without having any "available remedy," and they might have had a clear right to recover the debt, though not in that form of action; there might be some technical reason why they could not recover; the defendant might have pleaded in abatement. From the note to *Atkinson v. Settree*, it appears that the Court had no jurisdiction, and, therefore, the arrest was illegal. Those cases of forbearance in which it has been held, that the

(a) 8 Dowl. 604.

(b) 4 Taunt 117.

(c) 4 T. R. 611.

(d) 4 A. & E. 858; See S. C.

6 N. & M. 324.

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consideration would not support the promise, appear to have been cases where the arrest was illegal, and where the Court would have discharged the party out of custody on motion. The right to recover compensation for his detention, does not prevent the immediate release being a benefit, and, moreover, this not being a malicious arrest, no damages could be obtained. This contract is perfectly legal. If the action against Dunlop had been brought for the purpose of extorting money, that would be a matter between them, and would not affect the case of a third party. The allegation in the plea of knowledge on the plaintiffs' part, appears only to refer to the "available remedy," and there is no statement that they knew they had no claim or demand against Dunlop. In *Herring v. Dorell (a)*, the one defendant being discharged, the detainer of the other in custody was clearly illegal, but here the custody was legal. *Barrell v. Trussell (b)*, does not touch this case. *Duke de Cadaval v. Collins (c)*, was a case of gross extortion, and the proceedings were not set aside for irregularity. That case only decides, that money had and received will lie to recover back money extorted under legal process. Here it is not averred that the proceedings were malicious. In *Greenleaf v. Barker (d)*, it is said, "every consideration must be for the benefit of the defendant, or some other at his request, or a thing done by the plaintiff, for which he laboureth, or hath prejudice;" this case comes within that definition, and the consideration is good.

POLLOCK, C. B.—I am of opinion that the plaintiffs are entitled to judgment. This is an action on a promise to pay a sum of money on the discharge of a defendant to a former action out of custody. For aught that appears, the arrest was legal, and the defendant was in legal custody. Nor can it be said that this was a case of duress or of fraud,

(a) 8 Dowl. 604.

(b) 4 Taunt. 117.

(c) 4 A. & E. 858.

(d) Cro. Eliz. 194.

—there is no sufficient allegation of fraud in any part of the plea. The substance of the plea is, that there was not any claim or dispute, or cause of action in respect of which the plaintiffs were entitled to sue the then defendant. There is no averment that the plaintiffs were aware of that, and, from anything that appears in the plea, the original inception of the action was perfectly *bonâ fide*, though the plaintiffs might have been mistaken as to their right on the form of proceeding. The plea goes on to state that the plaintiffs did not, by discharging Dunlop from custody, give up or part with any available remedy. The words “available remedy” are not very precise in their meaning; they would be satisfied by the fact of Dunlop being a mere pauper. The plea does not state that there was no legal right or legal remedy, but only that there was no “available remedy.” There might be some latent defect which could be shewn by pleading, or some defect in the evidence; and though the plaintiffs had no “available remedy,” an action might have been honestly commenced to enforce the claim. There is no authority for saying, that because the proceedings are open to a plea in abatement for some latent defect; therefore a promise to pay the debt, in consideration of the defendant’s discharge, would not be available. That is the only part of the plea to which there is any averment of knowledge on the part of the plaintiffs. It then goes on to say that the action was not brought for the purpose of trying any doubtful or contested question of law or fact. It appears to me that the declaration in its form calls for an answer, and that this plea is not a sufficient answer. I agree with the general scope of Mr. *Peacock’s* argument. I think that if a party does a legal act for the purpose of making it an instrument of oppression, or if a party abuses the process of the law, and obtains the arrest of another with a view to make it an instrument of extortion, that is a fraud on the law. If the arrest or its continuance were of that character, and, by proper averments, were so alleged in the plea, it would very likely constitute a good

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defence to an action of this sort. But the present plea falls short of that; the arrest being perfectly legal, and there being no averment of knowledge on the part of the plaintiffs, except that they were aware that they did not part with any available remedy. I think, therefore, that this plea does not contain sufficient to bring it within the scope of the cases cited as to want of consideration, and that our judgment must be for the plaintiffs.

PARKE, B.—I am of the same opinion, and also think the plaintiffs entitled to judgment. In the first place, I think the declaration is sufficient on general demurrer. It appears that an action was brought against a person of the name of Dunlop, and there is an averment that Dunlop had been arrested and was in custody, under and by virtue of a writ of *capias* duly issued in the action. It must be intended *primâ facie* that the action was legal, and that the writ was duly, regularly, and properly issued. That doctrine is laid down in the case of *Bidwell v. Catton* (a), which was an action of *assumpsit* upon a promise to pay 50*l.* in consideration of forbearance to prosecute a suit. There, after verdict, it was moved, in arrest of judgment; first, that it was not alleged that the plaintiff had any just cause of action; and, secondly, that the action still remained. But the Court, nevertheless, gave judgment; “for, first, suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit;”—“secondly, though this did not require a discharge of the action, yet it requires a loss of the writ, and a delay of the suit, which was both a benefit to the one, and a loss to the other.” Therefore, I think, that *primâ facie* the declaration is sufficient, the action being presumed to be right—the *capias* being presumed to have lawfully issued. There is another case, *Pooly v. Gilberd* (b), in which it appeared that “the plaintiff had preferred a bill in Chancery against the defendant for

(a) Hob. 216.

(b) 2 Bulst. 41.

marriage money by her received; the defendant, upon this, in consideration, that the plaintiff would stay the suit there, by him commenced, she did assume to pay him 100*l.*, and also to deliver up a bond of 40*l.* which she had; upon this promise the plaintiff made stay of his suit; but the defendant not performing the promise, upon this the action was brought, and a verdict found for the plaintiff: it was moved for the defendant, in arrest of judgment, that the declaration was not good, for that there was no good ground for to raise the promise, there being no sufficient consideration for the same; for it doth not appear in the declaration, that the suit in Chancery was a lawful suit to be there determined; and so if the suit was not lawful, the consideration to forbear such a suit was no good consideration to raise a promise." But the Court say, that "if the plaintiff had only a subpoena out of the Chancery against the defendant, and did not make the cause thereof known unto him; if he, in consideration that he would not prosecute any further against him, did assume to pay him so much, this clearly is a good consideration to raise a promise." Upon these authorities, and upon principle, the declaration is sufficient on general demurrer. The question then is, whether the plea, which must be construed most strongly against the defendant, is any answer. I agree with Mr. *Crompton* that it is difficult to understand upon what principle this plea is founded. It appears that the defendant in the other action has sustained some hardship, but not from an illegal arrest; and the plea is certainly not good on the ground of fraud, because there is no averment of a false statement or representation of fact in order to procure the arrest; still less does it disclose any ground of duress, since all the averments in the plea shew that the imprisonment was lawful. If good at all, it must be on the ground of want of consideration for the promise. It seems to me that the plea does not disclose sufficient matter to shew a want of consideration. The plea in substance is, that

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“there was no claim or demand, or cause of action, against Dunlop, in respect of which the plaintiffs could or were entitled to recover;” but it is not averred that the plaintiffs knew that fact. We must, therefore, assume that the plaintiffs regularly and duly obtained a Judge’s order to arrest the defendant. The plaintiffs then had the advantage of a writ of *capias*, and the plea does not shew that the *capias* might have been set aside, or that the plaintiffs were guilty of any irregular conduct, nor is it averred that the plaintiffs, without any reasonable or probable cause, arrested Dunlop. It must then be assumed that Dunlop was in custody at the suit of the plaintiffs, under process which was legal; therefore the discharge from that process is a sufficient consideration to support the promise. With respect to the quantum of damage we have nothing to do. Upon the ground that the plea does not shew (what I suppose it was the object of the pleader to shew) that there was no consideration at all,—that the plaintiffs were responsible for keeping Dunlop in custody; that the discharge was no benefit to Dunlop or disadvantage to the plaintiffs—this case falls within the definition pointed out by Mr *Crompton*, and which is the correct one, “that every consideration must be for the benefit of the defendant, or some other at his request, or a thing done by the plaintiff, for which he laboureth, or hath prejudice (a).” As the plea does not disclose a sufficient answer to the declaration, our judgment must be for the plaintiffs.

GURNEY, B.—In order to make the plea good, it ought to have stated, either that the action was improperly brought, or that the plaintiffs acted fraudulently.

Judgment for the Plaintiffs.

(a) In *Greenleaf v. Barker*, Cro. Eliz. 194.



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THIS was an action for goods sold and delivered, and for money due on an account stated. The defendant pleaded the general issue and payment, to the whole declaration; and as to the sum of 5*l.*, parcel of the moneys in the declaration, a set-off.

The particulars of demand stated the action to be brought "to recover the sum of 37*l.*, being the balance of the following account;" then followed various items for goods sold amounting to 108*l.*, but no credit was given in express terms for any sums which reduced the 108*l.* to 37*l.*

At the trial before *Pollock*, C. B., at the last Assizes at Appleby, the plaintiff proved by the admission of the defendant, that a balance of 37*l.* odd was due. The defendant proved his set-off of 5*l.*, and contended that the set-off was pleaded to so much of the balance claimed by the particulars, and that therefore the 5*l.* should be deducted from the 37*l.* The learned Judge left it to the jury to say whether the balance claimed, meant a sum after giving credit for the set-off. A verdict was found for 37*l.*

In an action for goods sold, &c., the particulars of demand stated the action to be brought "to recover the sum of 37*l.*, the balance of an account of 108*l.*," (giving no credit for any specific sums.) The defendant pleaded as to 5*l.*, parcel, &c. a set-off to that amount: *Held*, that it was a question for the jury to say, whether the balance claimed meant a sum, after giving credit for the 5*l.* set-off.

Atkinson moved for a new trial, on the ground of misdirection, and submitted that the learned Judge ought to have decided as a question of law that the set-off was pleaded to the balance. He cited *Eastwick v. Harman* (a). *Tuck v. Tuck* (b), Reg. Gen. Trin. T. 1 Vict. (c).

POLLOCK, C. B.—It was proved at the trial that the parties met together, and that the defendant then admitted a balance of 37*l.* to be due. I thought it was a question for the jury, whether the set-off was taken into consideration, when the defendant admitted the balance. The rule of

(a) 8 Dowl. 399; See S. C. & W. 109.

6 M. & W. 13.

(c) 8 A. & E. 280.

(b) 7 Dowl. 373; S. C. 5 M.

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Court is, that a defendant need not plead payment of a sum for which credit is given in the particulars ; but still it must be an open question for the jury to say, whether a balance exists upon the whole account between the parties. *Lamb v. Micklethwaite* (a) is quite decisive of this case ; the only difference is, that that was a case of payment, this is one of set-off. Where a party demands a balance, without stating how that arises, if the defendant plead payment, the plaintiff may show that in his balance, credit has already been given for the sum pleaded. A set-off is not even within the rule of Court, and so the difficulty does not arise ; but supposing it did, *Lamb v. Micklethwaite* is a decisive authority, that though a defendant ought not to plead payment of a sum for which credit is given ; yet if he pleads payment, when the plaintiff claims a balance, it is a question for the jury, to say whether or not in such balance, credit has not already been given for the sum pleaded. Divested of technicalities, the matter stands thus : the plaintiff says, " You owe me 100*l.* on the balance of account ;" the defendant says, " I have paid 50*l.*, and have a set-off to the amount of another 50*l.*" At the trial, the plaintiff proves, by the admission of the defendant, that 100*l.* is due upon the balance of account : the defendant then proves payment of 50*l.* and a set-off of another 50*l.* ; the plaintiff then calls a witness to prove that the 50*l.* paid and the 50*l.* set-off are both included in the balance.

PARKE, B.—A set-off is not within the operation of the rule ; consequently, when the plaintiff says that he claims a balance, he only means to say, he is willing to take that sum ; but he is at liberty to prove any part of his demand, and is not bound to prove the extent of his demand. For instance, if he claims 100*l.*, and says that he is willing to take the balance amounting to 37*l.* odd ; if he proves any part of the balance, he is entitled to a verdict. When he

(a) 1 Q. B. 400 ; See S. C. 1 G. & D. 136 ; 9 Dowl. 531.

gives credit in this form in the particulars, he only means to say, "I am willing to take that sum stated as the balance." The plea of set-off was to part of the 100*l.* demanded, not to the 37*l.* demanded. My Lord was quite right in leaving it to the jury to say, whether or not the set-off had not been taken into account when the defendant admitted the balance. It is perfectly settled that the New Rule does not apply to cases of set-off, but only to cases of payment, *Rowland v. Blaksley* (a). Independently of that question, supposing the pleas of set-off and of payment to stand on the same footing, this particular does not give credit for any specific sum set-off or paid; but only claims a balance.

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v.
JACKSON.

Rule refused.

(a) 1 Q. B. 403; S. C. 2 G. & D. 734.

DREW v. AVERY and Another.

TRESPASS de bonis asportatis.

Plea: That before the said time when, &c., to wit, on the 25th of June, in the year of our Lord 1843, the defendants being then seised in their demesne, as of fee, of and in a certain messuage, demised the same to one E. T. Rowley, for a certain term, to wit, a term of three years, commencing from the 24th day of June, in that year, at and under a certain rent, to wit, the yearly rent of 75*l.*, payable quarterly, to wit, on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June, in every year, by even and equal portions; by virtue of which said demise, the said Rowley then entered into and upon the said dwelling-house, and

To trespass de bonis asportatis, the defendant pleaded, that before the said time when, &c., to wit, on the 25th of June, 1843, the defendant being seised of a messuage, demised the same to R. for a certain term, to wit, a term of three years, commencing from the 24th of June in that

year, at a certain yearly rent; that before the said time when, &c., and during the said demise, and the term thereof granted, to wit, on the 25th of December, 1843, a certain sum of the rent aforesaid for a certain term, to wit, a quarter of a year of the said tenancy, ending on the day and year last aforesaid, became due, and at the said time when, &c. remained in arrear; whereupon the defendant, at the said time when, &c., entered and distrained for the said arrears of rent: *Held*, on special demurrer, that the plea was bad, for not specifically stating that the tenancy existed at the time of the distress.

Quare, if the demise were well stated?

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became and was possessed thereof, for the said term so to him thereof granted as aforesaid; that before the said time when, &c., and during the said demise, and the term thereof granted, to wit, on the 25th day of December, in the year of our Lord 1843, a certain sum of money, to wit, 18*l.* 15*s.*, as the rent aforesaid, for a certain time, to wit, a quarter of a year of the said tenancy, ending on the day and year last aforesaid, and then last elapsed, became and was due and in arrear from the said Rowley to the defendants, and at the said time when, &c., remained in arrear; whereupon the defendants, at the said time when, &c., entered into the said messuage, to distrain for the said arrears of rent, and did then and there distrain the goods and chattels in the said declaration mentioned, then being in the said messuage, in which, &c., and subject to such distress, as and for a distress for the said arrears of rent, and impounded the same, and at the expiration of five days from such distress, to wit, on the 8th day of January, in the year of our Lord 1844, the defendants caused the said goods and chattels to be duly appraised, and then sold the same, by virtue of such distress, according to the form of the statute in such case made and provided, in satisfaction of the said arrears of rent, and the costs of the said distress and sale, *quæ sunt eadem*, &c. Verification.

Special demurrer, assigning for causes: that it is consistent with every thing stated in the plea, that the alleged tenancy might have expired at the time of the committing of the trespasses, and the landlord's title and the tenant's possession have long before ceased: that the bare allegation that the goods and chattels were, at the time in question, subject to the distress, is by itself vague, uncertain, and insufficient: also, that the defendants should proceed to state by positive averment, the terms of the alleged demise, as matter of fact, and not by way of mere inference and deduction; whereas they have only averred that they demised to Rowley without disclosing by means of any positive or traversable allegation, the terms of the alleged demise.

Corrie, in support of the demurrer. The plea does not shew that a tenancy existed at the time the distress was made. At common law, a landlord could not distrain, after the determination of a lease; and the 8 Anne, c. 14, ss. 6 and 7, which enable him to do so, require the distress to be made within six calendar months after the determination of the lease, and during the continuance of the landlord's interest, and also during the possession of the tenant. This plea is not according to the precedents; that, in 3 *Chitty on Pleading*, p. 1009, 6th ed. alleges that "he, at the said time when, &c., held and enjoyed the dwelling-house." It will, perhaps, be argued, that there is a distinction between replevin and trespass; but though in the latter case the defendant need not set out title, yet he must justify, so as to shew that he is not a trespasser, *Rogers v. Birkmire* (a). Where a defendant pleaded that 'the plaintiff, at the time when, &c., held and enjoyed a dwelling-house, &c., as tenant thereof, to L., under a demise thereof, viz.: a demise before then made by L. to the plaintiff,' the Court intimated that the plea would have been bad, if specially demurred to, for not stating the demise with sufficient particularity, *Bowler v. Nicholson* (b).

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Barstow, contra. The averments shew an existing tenancy at the time of the distress. The declaration is dated the 18th day of April, A. D. 1844, and the plea states, "that before the said time, when, &c., to wit, on the 25th of June, A. D. 1843, the defendants being seised in their demesne as of fee, of and in a certain messuage, demised the same for a certain term, to wit, a *term of three years*, commencing from the 24th day of June in *that year*." If issue were taken on the demise, the defendants would be bound to prove a term for three years, com-

(a) Ca. temp. Hardw. 245; See S. C. 2 Str. 1040.

(b) 4 P. & D. 16; S. C. 12 A. & E. 341.

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mencing on the 24th of June, 1843. [*Parke*, B.—But the distress might have been made ten years ago. It is not distinctly averred that the distress took place after the 24th of June, 1843. It is only to be inferred from the allegation that the rent remained in arrear; but that is an immaterial averment. *Pollock*, C. B.—Unless the word “*whereupon*” contains the necessary allegation, there is nothing to shew that the distress was made after the rent became due.] The distinction between replevin and trespass, and the strictness required in the former, is pointed out in *Rogers v. Birkmire* (a).

Corrie, in reply, cited *Parkinson v. Whitehead* (b).

POLLOCK, C. B.—We are of opinion, that the existence of the tenancy is an averment which ought to have been made in the plea, and as the objection is distinctly pointed out by the special demurrer, the time of the Court ought not to be occupied in contrasting different parts of the pleadings, in order to remedy the defect.

PARKE, B.—I am of the same opinion. I think that, probably, by looking at all the various allegations, it might be collected, as matter of inference, that the rent was due at the time of the distress. But my present impression is, that it is not sufficient merely to state a demise, without stating what the term was; if so, the “*videlicet*” will not do. If issue were taken on that part of the plea, the demise must be proved strictly as laid. Supposing that to be so, the allegation in this plea, that the term continued at the moment of the distress, is not specifically made, and as the defect is pointed out as a cause of special demurrer, I agree that we ought to hold this plea to be bad.

Judgment for the Plaintiff.

(a) *Ca. temp. Hardw.* 245.

(b) 2 *M. & G.* 329; See *S. C.* 2 *Scott*, *N. R.* 620.

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EMPEY v. KING.

A RULE nisi for an attachment had been obtained upon an affidavit, the jurat of which was as follows:—

“Sworn by the above named deponent,” &c., “at my Chambers, Rolls’ Gardens, Chancery-lane, this 19th day of November, 1844.”

E. H. ALDERSON.”

The jurat of an affidavit, stating it to be sworn at a Judge’s Chambers, is sufficient, without stating that it was sworn before the Judge.

Lush, in shewing cause, objected, that the affidavit was insufficient, inasmuch as it did not appear to have been sworn before the Judge. He cited *The Queen v. Inhabitants of Bloxham* (a), where, on motion to quash a writ of certiorari, an affidavit, sworn before a commissioner, which omitted the words “before me,” was held bad.

Warren, in support of the rule, submitted, that the present case was distinguishable from *The Queen v. Inhabitants of Bloxham*. There the affidavit purported to be sworn before a commissioner in the country; but the words, “At my Chambers” had always been considered sufficient, when the affidavit was made before a Judge.

POLLOCK, C. B.—We think that enough. In the case of a commissioner, the omission of the words “before me,” may, perhaps, render the affidavit bad, but it is not so here. This form of jurat has been invariably used, and we are unwilling to disturb the practice by questioning its validity.

PARKE, B.—The jurat is in conformity with the invariable practice.

Rule absolute.

(a) *Ante*, p. 168.

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ARTHUR v. MARSHALL.

A rule, calling on a defendant who resides in the country to pay money due on an award, is a six day rule; and where such rule was moved for on the 21st of November, the Court refused to make it returnable either on the last day of that Term, or at Chambers.

LUSH, (on the 21st of November,) obtained a rule, calling on the defendant to shew cause why he should not pay a certain sum of money due on an award, and on the Master's allocatur, (with a view to issue execution under the 1 & 2 Vict. c. 110, s. 18.) The application was made on the usual affidavit of personal service on the defendant, who resided in the country, and of demand of payment. The Master had drawn up the rule to shew cause in the next Term. *Lush*, on the following day, applied to have the rule amended, by being drawn up to shew cause on the last day of the present Term, on the ground that the party might otherwise be deprived of the benefit of the execution. [*Pollock*, C. B.—We are informed that this is a six day rule, and in the absence of any special reason for shortening the time, it would be wrong to do so. The rule is correct in its present form.] *Lush* then applied to have the rule drawn up to shew cause at Chambers.

POLLOCK, C. B.—That would be more objectionable; it would be, in effect, extending the Term.

Rule refused.

In re J. C. SMITH.

The "directions to the taxing officers" of Trin. T. 7 Vict., do not prevent the Master from allowing an attorney, as against his client, the costs of counsel, retained by express direction of the client, and with full knowledge that such costs could not be recovered against the opposite party.

THIS was a rule calling on one Walton to shew cause why the Master should not review his taxation of the costs of J. C. Smith, an attorney. It appeared, from the affidavit of Smith, that he had been retained by Walton to defend an action brought against him by a person of the name of Taylor, for the recovery of a sum under 20*l*. The

cause came on for trial before the under sheriff of Staffordshire, when the plaintiff was nonsuited; but, subsequently, a rule was made absolute for a new trial. After notice had been given for the second trial, Walton told Smith that he had heard that the plaintiff meant to retain counsel, and, therefore, he (Walton) wished also to have counsel. Smith thereupon told him, that if counsel were employed, a brief must be prepared; the expense of which, together with counsel's fee, would be heavy, and even in the event of success, they would not be allowed on taxation against the opposite party. Walton, however, said that he must have counsel, as it would not do to allow the opposite party to have them unopposed. The affidavit, in conclusion, stated, that it was solely in consequence of instructions to that effect from his client, that counsel was employed; and that he believed, if he had not followed those instructions, Walton would have proceeded against him for neglect of duty. The plaintiff obtained a verdict, and Smith delivered his bill of costs against the defendant, which was taxed under a Judge's order. The Master, on taxation, disallowed a sum of 7*l.* 18*s.* 2*d.*, the expense of the brief and counsel's fee, conceiving that he was bound to do so under the Reg. Gen. Trin. T. 7 Vict. (*a*), intituled, "Directions to the taxing officers, in lieu of the directions of Hilary Vacation, 4 Wm. 4, 1834, so far as relate to the scale of costs in cases where the sum recovered, &c., does not exceed 20*l.*"

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Pashley shewed cause. The words of the rule are imperative, and the Master has no discretion in the matter. It would seem, from the case of *In re Woollett* (*b*), that where an attorney's bill is referred for taxation under the 6 & 7 Vict. c. 73, s. 37, the Judge has no discretion as to costs, but they must abide the event of the taxation. The rule of Trinity Term, 7 Vict. has the force of an act of Parlia-

(*a*) *Ante*, p. 90.

(*b*) *Ante*, Vol. 1, p. 593; See S. C. 12 M. & W. 504.

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ment. [*Parke*, B.—Not at all: it is only a direction to the officers of the Court as to their conduct on taxation. *Pollock*, C. B.—Is not the case of a special direction unprovided for by the rule? Suppose, in an ordinary action, a party choose to have several special counsel, he cannot, if successful, make the opposite party pay for those expenses; but he is bound to pay them himself. Can it be said, that the rule was intended to prevent a party from having, at his own expense, any assistance he may wish?] Great inconvenience would result from allowing the Master to try, whether or not, a special contract has been made between an attorney and his client as to additional costs. That question should be determined by a jury; but the Master's certificate would deprive the client of the right, for the 6 & 7 Vict. c. 73, s. 43, renders it final and conclusive, and the Court may order judgment to be entered up for the amount of costs which it finds to be due. In *Levy v. Magnay* (a), which was a case on the "Directions to taxing officers" of Hilary Term, 4 Wm. 4, and for which the rule of 7 Vict. is a substitute, the Court say that it is better to adhere to the settled rule, and not enter into the merits of each particular case. The true construction of the rule may be collected from the concluding paragraph, namely (b): "The foregoing charges are intended as examples. The Masters will exercise their discretion in allowing for attendances, having regard to the expense saved, or favour granted to the party, and to all the circumstances of the case; bearing in mind, that for attendances, the allowances are not to be more than half what are allowed, when costs are taxed upon the usual scale. In other cases not hereby provided for, the Masters will conform to the rate of charges hereinbefore inserted, or as near thereto as circumstances will allow." Expressio unius est exclusio alterius. A discretion being allowed to the Master in cases of attendance, shews that he was not to exercise it in other cases.

(a) 10 M. & W. 664; S. C. 2 Dowl. 512, N. S.

(b) *Ante*, p. 91.

This is not a case falling within the general description of
 “a case not otherwise provided for.”

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POLLOCK, C. B.—The rule must be absolute on the ground, that the Master appears to have considered that he had no discretion whatever; but that by the “Directions to the taxing officers,” he was excluded from allowing the costs of attendance of counsel. No doubt, the object of those “Directions” was to protect the parties opposed to each other in the suit against expenses; but they also had for their object the protection of the client and the public against the attorney acting for the client. It will, therefore, be the duty of the Master, when unusual directions are alleged to have been given, very strictly to inquire into the circumstances, and to have them proved by the most satisfactory evidence, so as to leave no doubt in his mind that the client was duly informed that he would recover none of the costs from the opposite party, and that with full knowledge of that fact he required the additional assistance for which the charge is made. As the Master appears to have acted on the principle that he had no discretion: the case must be referred back to him, that he may strictly inquire into the facts, and as far as possible protect the client against any improper charge of the attorney. If it should clearly appear, that these additional costs were incurred in consequence of express directions to that effect, given by the client with full knowledge of the consequences, the Master in his discretion may allow them.

Martin, who was to have argued in support of the rule, then referred to the 43rd section of the 6 & 7 Vict. c. 73.

PARKE, B.—That section certainly furnishes an additional reason for making this rule absolute, for it renders the Master’s certificate final and conclusive as to the amount. If, therefore, these costs have been incurred by

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the express direction of the client, and the attorney is now disallowed them, he cannot recover them hereafter.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute.

BUNNETT v. SMITH.

In an action by the assignee of a patent for its infringement, the Court allowed the defendant to plead non concessit, and a traverse of the assignment, together with other pleas.

Where an action is brought by order of the Court of Chancery, it is no ground for disallowing pleas, that they raise issues upon matters not disputed in that Court; and per Rolfe, B., even though in violation of a positive agreement between the parties.

THIS was an action for the infringement of a patent, and was brought by the assignee of the patent, under an order of the Vice Chancellor of England. An application had been made at Chambers for leave to plead several matters, when *Alderson*, B., disallowed the pleas of non concessit, and a traverse of the assignment.

Hindmarch, moved to rescind the order, and for liberty to plead those matters. It was objected before the learned Judge, that the terms of the Vice Chancellor's order precluded the defendants from traversing the assignment; but that was a mistake. With respect to the plea of non concessit, his Lordship thought it ought not to be allowed, together with other pleas. There are several authorities, however, to shew that such a plea is good. In *Co. Litt.* 260, a, it is said "If a grant by letters patent under the Great Seal, be pleaded and shewed forth, the adverse party cannot plead nul tiel record, for that it appears to the Court that there is such a record; but inasmuch as it is in the nature of a conveyance, the party may deny the operation thereof, therefore, he may plead non concessit, and prove in evidence that the King had nothing in the thing granted, or the like, and so it was adjudged." In *Hynde's case* (a), it was resolved, that "against the King's letters patent,

(a) 4 Rep. 70, b.

under the Great Seal, shewed in Court, there is no denial of them, but non concessit per præd. literas patentes, is a good plea, for although there be such letters patent, yet, perhaps, nothing doth pass by them, and so per consequens non concessit." Where the effect of a patent is erroneously stated in the declaration, or if there is any misdescription of the invention, the objection can only be taken advantage of by plea of non concessit. Such a plea was allowed by the Court of Common Pleas in the case of *Bedells and Another v. Massey* (a).

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M. D. Hill shewed cause, upon affidavit, that the assignment was never questioned in the proceedings before the Vice Chancellor; and that when his Honor directed the action, it was understood between the parties, that the only point which should be in issue, was the infringement of the patent. Under these circumstances, he submitted, that it was a breach of faith in the defendant to attempt to raise a collateral issue.

Hindmarch was not called upon to support the rule.

POLLOCK, C. B.—The rule must be absolute. I do not see why we should prevent the defendant from questioning the assignment, merely because he did not do so before the Vice Chancellor. If the plaintiff wishes to impose terms on the defendant, he should apply to the Vice Chancellor for that purpose.

PARKE, B.—I am of the same opinion. There is nothing in the order of the Vice Chancellor to prevent the defendant from disputing the plaintiff's title as assignees of the patent, and the affidavit which has been relied upon, is far too vague to satisfy us of any agreement between the

(a) Since reported, *ante*, p. 322.

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parties to that effect. We must, therefore, deal with this application, as if it were made in an action brought in the ordinary course, and without the intervention of the Court of Chancery; that is to say, we ought to see whether these pleas are fair and good pleas on the face of them. If they are, they should be allowed; for if the defendant fails on those issues, he will have to pay the costs of them. Before the New Rules, the plaintiff's title might have been disputed under the general issue. As to the plea of non concessit, the authorities cited when the rule was moved, shew that such a plea is good. I, therefore, think that these pleas ought to be allowed.

GURNEY, B., concurred.

ROLFE, B.—I am disposed to go further, and hold that even if there had been a positive agreement between these parties not to dispute the assignment, that would be no reason why we should treat this action differently from any other, not brought by the direction of the Court of Chancery. If the defendant has done anything contrary to the order of the Vice Chancellor, the plaintiff should apply to him for redress. His Honor has better means than we have, of knowing and enforcing any order of his Court.

Rule absolute.

KING and Another v. HOARE.

To debt for goods sold, &c., the defendant pleaded, in bar, that the goods were sold to

DEBT for goods sold and delivered, &c.

Plea: That the said goods were sold and delivered by the plaintiffs to the defendant, jointly with one N. T. him jointly with one S., and not to the defendant alone, and were to be paid for by the defendant and S., and not by the defendant alone; that the plaintiff sued S. for the same debt, and recovered judgment; concluding with a verification: *Held*, on special demurrer, that a judgment recovered against one of two joint contractors is a good bar to an action against the other, though no execution has issued: *Held* also, that it sufficiently appeared that the debt was not joint and several; that the matter was properly pleaded in bar, and not in abatement; that the plea did not amount to the general issue; and that it need not conclude with prout patet per recordum.

Smith, and not to the defendant alone; and were to be paid for to the plaintiffs by the defendant, jointly with the said N. T. Smith, and not by the defendant alone; and that the said moneys in the declaration mentioned were, at the time of the accruing thereof, to wit, &c., due from the defendant and the said N. T. Smith, jointly, and not from the defendant alone; that the said moneys continuing and being due and payable by the defendant, jointly with the said N. T. Smith, the plaintiffs heretofore, to wit, &c., in this Court, impleaded the said N. T. Smith in an action of debt, for the detaining and not paying of the said moneys and debt, and for and in respect of the same identical causes of action in the declaration mentioned; and such proceedings were thereupon had in the said action, that afterwards, to wit, on, &c., the plaintiffs, by the consideration and judgment of the said Court, recovered in the said action against the said N. T. Smith, the said several moneys and sum of 16,000*l.* above demanded, as also 90*l.* 6*s.* as damages and costs, whereof the said N. T. Smith was convicted (prout patet per recordum); which said judgment still remains in full force and effect, not in the least reversed or made void. Verification.

Special demurrer, assigning for causes; that the defendant had pleaded in bar of the action, matter which ought to have been pleaded, if at all, in abatement: that the plea amounted to a plea of never indebted: that the plea did not aver that the moneys were not due from the defendant and N. T. Smith severally as well as jointly: that the recovery of a judgment against one of two debtors, in a sum certain, does not of itself, or without satisfaction, operate in law to bar the action of the creditor against the other debtor: and that the plea ought to have concluded with a statement, that the defendant was ready to verify by the record.

J. Henderson, in support of the demurrer (*a*). There is

(*a*) This demurrer was argued before *Parke*, B., *Gurney*, B., and *Rolfe*, B.

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neither precedent nor authority to shew, that a judgment recovered against one of two joint debtors, may be pleaded in bar to an action against the others. In the case of *Brown v. Wootton* (a), the Court recognised the distinction between actions of debt and tort. In the latter case, a judgment against one tortfeasor, without satisfaction, is a bar to an action against the other. The Court there said, "and the difference between this case, and the case of debt, upon an obligation against two, is, because there every of them is chargeable and liable to the entire debt; and, therefore, recovery against the one is no bar against the other, until satisfaction." [*Parke, B.*—In the report of that case, in *Yelverton* (b), the position is thus stated; "as where two are bound to J. S., jointly *and severally*, the recovery and execution against one, is no bar against the other; for execution is not any satisfaction of the 100*l.* demanded." The language there used by the Court, must have had reference to a joint and several bond.] The dicta of modern Judges, on this point, are somewhat at variance. In *Bell v. Banks* (c), *Maule, J.*, says, "It may be, that the taking a security of a higher nature from one of two joint debtors would cause a merger." It is intimated by Lord *Tenterden*, in *Watters v. Smith* (d), "that a mere recovery against one joint debtor, will not exempt the other debtor from his obligation." In *Lechmere v. Fletcher* (e), *Bayley, B.*, adverting to the language of *Popham, J.*, in *Brown v. Wootton* (f), says, "If, indeed, that were the case of a joint bond, and not a joint and several bond, we have been referred to no authority which goes that length; *it may be*, that where you sue, and recover a judgment against one debtor only, on a contract which is joint, and not several, that your right to sue on the joint contract is destroyed." The present point, however, was not there decided, as that case turned upon the resolution in *Hig-*

(a) Cro. Jac. 73.

(b) p. 67.

(c) 3 M. & G. 267; See S. C.
 3 Scott, N. R. 497.

(d) 2 B. & Ad. 893.

(e) 1 Cr. & M. 634.

(f) Cro. Jac. 73.

gens's case (a), "that where two are bound jointly and severally, and the obligee has judgment against one of them, yet that he may sue the other." In *Com. Dig.*, tit. "*Action*," (L 4), it is said, "As if two be bound by a bond, a recovery and execution against one, is no bar in an action upon the same bond against the other obligor." In the present case, there is a joint debt, which may be recovered from each, unless there be a plea in abatement, *Rice v. Shute* (b). [*Alderson*, B.—The plaintiff, by bringing an action against the other debtor, has prevented the defendant from pleading the nonjoinder in abatement.] In the case of *Sheehy v. Mandeville* (c), decided in the Supreme Court of the United States, it was held, "that the *whole* of a joint note is not merged in a judgment against *one* of the makers, on his individual assumpsit; but the other may be charged in a subsequent joint action, if he pleads severally." Since the 3 & 4 Wm. 4, c. 42, s. 10, if this defendant pleaded in abatement, and a joint action were afterwards brought, a verdict might be found against this defendant, and for the other. There are also formal objections to the plea; first, that the plea leaves it uncertain whether the debt is not several as well as joint; secondly, that there ought to have been a plea in abatement, *Mainwaring v. Newman* (d); and thirdly, that the plea ought to have concluded with prout patet per recordum. He cited also *Ex parte Bryant* (e), *Bryant v. Withers* (f).

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Bramwell, contra. The cases cited on the other side are distinguishable. In *Watters v. Smith* (g), the defendant's only course was to plead in abatement. In *Bell v. Banks* (h), the facts were essentially different from the

(a) 6 Rep. 44, b.

(b) 5 Burr. 261; See S. C. 2 W. Bl. 695.

(c) Reported in *Cranch's American Law Reports*, Vol. 6, p. 253.

(d) 2 B. & P. 120.

(e) 2 Rose, 1.

(f) 2 M. & Sel. 123.

(g) 2 B. & Ad. 889.

(h) 3 M. & G. 263; See S. C. 3 Scott, N. R. 497.

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present. In that case, *Maule*, J., asks; "Have you any case in which a judgment in favour of trustees, created a merger of a right of action vested in cestui que trust?"—The decision in *Drake v. Mitchell* (a), proceeded on the ground that the first action was brought upon the note, and not upon the covenant. In *Lechmere v. Fletcher* (b), the Court assumes the law to be as the defendant contends it is; for they say, "If, on a joint contract, you have sued one and entered judgment against him, there might be an invincible obstacle; because, upon a new action against another of the parties to the contract, the defendant would have a right to plead that he made no promise, except with the other defendant, against whom the judgment was entered, and he could not be joined." It is laid down in *Com. Dig.*, tit. "Action," (K 4), that "a recovery against one obligor and executor will be a bar in debt against the other." *Dennis v. Payn* (c) is also in point. The plaintiff having brought his action against one party, the matter has passed in rem judicatam. The principle is, that where a party enters into a contract, in which he is to be sued jointly with another, he is prejudiced by being sued alone; *Seaton v. Henson* (d). Secondly, a verification by the record, would be improper, as the plea consists of several facts, which, if traversed, must be tried by a jury. [*Parke*, B.—A verification by the record is only proper when the plea consists of a fact capable of proof by the record alone.] It sufficiently appears by the plea, that the contract declared on was joint only, and not joint and several. He cited also *Sir John Nedham's case* (e).

Henderson replied.

Cur. adv. vult.

The judgment of the Court was delivered by
PARKE, B.—This was an action of debt, and the plea

(a) 3 East, 251.

(b) 1 Cr. & M. 635.

(c) Cro. Car. 551.

(d) 2 Lev. 220; See S. C. 2 Show. 20.

(e) 8 Rep. 135, b.

stated, that the contract in the action was made by the plaintiffs with the defendant and one N. T. Smith, jointly, and not with the defendant alone; and that in 1843, the plaintiffs recovered a judgment against Smith for the same debt, with costs, as appears by the record, which judgment still remains in full force and unreversed; concluding with the common verification. To this plea there was a demurrer, assigning several special causes: first, that it was a plea in abatement not properly pleaded; to which the answer is, that the plea does not give a better writ, and that it is clearly a plea in bar. Secondly, that it amounts to the general issue; it does not, however, amount to the general issue, for it admits a debt originally due. Thirdly, that it does not aver that the debt was not due from the defendant and Smith, severally, as well as jointly; to which it was properly answered, that the plea sufficiently shews the identical contract declared upon to be joint, and that it cannot be intended, *primâ facie*, at least, that the same contract was both joint and several. And, lastly, it was objected, that the plea ought to have concluded with a verification by the record. The Court, however, intimated its opinion, that such an averment, although proper when the plea contains matter of record only, was not proper when the averment of matter of record was mixed with averments of matters of fact, on which an issue of fact might be taken. In the case of a plea of judgment recovered for the same cause of action, the matter of record is the only thing which can be directly put in issue on the plea. If the judgment were recovered for another cause, there ought to be a new assignment.

These matters of form being disposed of, the question is reduced to one of substance—whether a judgment recovered against one of two joint contractors, is a bar in an action against another?

It is remarkable, that this question should never have been actually decided in the Courts of this country. There have been apparently conflicting dicta upon it. Lord Ten-

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terden, in the case of *Watters v. Smith* (a), is reported to have said that a mere judgment against one could not be a defence for another. My Brother *Maule* stated, in *Bell v. Banks* (b), that a security by one of two joint debtors, might merge the remedy against both. In the case of *Lechmere v. Fletcher* (c), *Bayley*, B. strongly intimated the opinion of the Court of Exchequer to be, that the judgment against one was a bar for both of two joint debtors; although the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question, we must decide it upon principle and by analogy to other authorities; and we feel no difficulty in coming to the conclusion that the plea is good.

If there be a breach of contract, or wrong done, or any other cause of action, by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can at that stage; and it would be useless and vexatious to subject the defendant to another suit, for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem judicatam*—the cause of action is changed into matter of record—which is of a higher nature, and the inferior remedy is merged in the higher. And this appears to be equally true, when there is but one cause of action, whether it be against a single person or many. The judgment of the Court of record changes the nature of that cause of action, and prevents its being the subject of another suit; and the cause of action being single, cannot afterwards be divided into two. Thus it has been held, that if two commit a joint tort, the judgment against one is of itself, without satisfaction, a sufficient bar to an action against the other for the same cause, *Brown v. Wootton* (d). And, though in the report of *Yelverton* (e), expressions are

(a) 2 B. & Ad. 893.

(b) 3 M. & G. 267.

(c) 1 Cr. & M. 634.

(d) Cro. Jac. 73.

(e) p. 67.

used, which at first sight appear to take a distinction between actions for unliquidated damages and debts; yet upon a comparison of all the reports, it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. Chief Justice *Popham* states the true ground: he says, "If one hath judgment to recover in trespass against one, and damages certain," that is, converted into severalty by the judgment, "although he be not satisfied, yet he shall not have a new action for this trespass: by the same reason, *à contrà*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other;" and "the difference betwixt this case and the case of debt upon an obligation against two, is, because there every of them is chargeable, and liable to the entire debt; and, therefore, recovery against one is no bar against the other, until satisfaction" (a). And it is quite clear that the Chief Justice was referring to the case of a joint and several obligation both from the argument of the counsel, as reported in *Croke James* (b), and the statement of the case in *Yelverton* (c). We do not think that the case of joint contract can in this respect be distinguished from a joint tort. There is but one cause of action in each case; the party injured may sue all the tort feorsors or contractors, or he may sue one, subject to the right of pleading in abatement in the latter case, and not in the former; but for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action. The distinction between the case of a joint contract and a joint and several contract is very clear. It is argued, that each party to a joint contract is severally liable; and so he is, in one sense—that, if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable, in the same sense, as he is on a joint and several bond, which instru-

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(a) Cro. Jac. 74.

(b) p. 74.

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ment, though on one parchment or paper, in effect comprises the joint bond of all and several bonds of each of the obligors, and gives different remedies to the obligee.

Another mode of considering this case is suggested by *Bayley, B.*, in the case of *Lechmere v. Fletcher (a)*, and was much discussed during the argument, and leads us to the same conclusion. If there be a judgment against one of two contractors, and the other is sued afterwards, can he plead in abatement, or not? If he cannot, he would be deprived of a right by the act of the plaintiff, without his privity or concurrence, by suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment as against himself; and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself and his co-contractor; so that he would be twice troubled for the same cause; or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule, that an action on a joint debt barred against one, is barred altogether; the only exception now being, where one has pleaded matter of personal discharge, as bankruptcy, and certificate.

It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement, both must be joined; and, if they were, the judgment pleaded by one, would be a bar for both; and it is impossible to hold that the legal effect of judgment against one of two, is to depend on the contingency of both being sued, or the one against whom judgment is obtained being sued singly, and not pleading in abatement. This consideration lead us satisfactorily to the conclusion, that, where judgment has been obtained for a debt as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party.

(a) 1 Cr. & M. 634.

During the argument, a decision of the Chief Justice *Marshall*, in the Supreme Court of the United States, was cited, as being contrary to the conclusion this Court has come to. The case is that of *Sheehy v. Mandeville* (a). We need not say that we have the greatest respect for every decision of that eminent Judge; but, we think the reasoning attributed to him in ~~that~~ report, is not satisfactory to us: and we have since been furnished with a report of a subsequent case, *Ward v. Johnson* (b), in which ~~that~~ authority was cited and considered, and in which the Supreme Judicial Court of Massachusetts decided that a judgment against one was a bar.

For the above reasons we are of opinion that our judgment must be for the defendant.

Judgment for the Defendant.

(a) *Cranch's American Law Reports*, Vol. 6, p. 253.

(b) *Tyng's American Law Reports*, Vol. 15, p. 149.

MORGAN v. WEST.

ASSUMPSIT. The declaration stated, that before and at the time of the making of the promise, &c., one Brown was a prisoner for debt in actual custody, to wit, in Maidstone Gaol, in the county of Kent, and was about to apply to and petition the Court for the relief of insolvent debtors in England to be discharged from such imprisonment, according to the provisions of a certain act of Parliament then and still in force, for (amongst other things) amending the laws for the relief of insolvent debtors in England, (1 & 2 Vict. c. 110); that the plaintiff, before and at the time of the making of the promise of the defendant, was, and still is, an attorney of the said Court for the relief of insolvent debtors in England; of all which premises the

Assumpsit; that in consideration that the plaintiff being an attorney, practising in the Insolvent Court, would take the necessary steps to procure the defendant's discharge under the Insolvent Act, the defendant promised to pay him his taxed costs.

Averment, that he did take the necessary steps,

and that his costs were afterwards "taxed by the Court for the relief of Insolvent Debtors" at a certain sum. Breach, non-payment. *Held*, bad on demurrer; for not averring a taxation by a competent authority.

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defendant then had notice: and thereupon, to wit, on, &c., in consideration that the plaintiff, at the request of the defendant, would put in bail, and conduct all necessary proceedings for procuring the discharge of the said Brown, from such imprisonment as aforesaid, under the said act for the relief of insolvent debtors, to wit, as such attorney as aforesaid, the defendant undertook and promised the plaintiff to pay him his *taxed costs*, to wit, as such attorney as aforesaid, and in respect of the premises as aforesaid. Averment: that the plaintiff, confiding in the promise of the defendant, did afterwards, to wit, on, &c., and on divers other days and times, &c., put in bail for the said Brown, and take and conduct all other the necessary steps and proceedings for procuring, and in order to procure, the discharge of Brown from such imprisonment: and although Brown, theretofore, to wit, on, &c., was by and through the said steps and proceedings, so taken and conducted by the plaintiff as aforesaid, discharged from such imprisonment as aforesaid, under and by virtue of and according to the provisions of the said act of Parliament; *and although the costs of the plaintiff, in the premises aforesaid, were afterwards, to wit, on, &c., taxed by the Court for the Relief of Insolvent Debtors in England, at, and then amounted to, a certain large sum of money, to wit, the sum of 30*l.* 17*s.*, of all which premises the defendant and Brown respectively had notice.* Breach, non-payment of the 30*l.* 17*s.*, or any part thereof, by J. T. Brown, or the defendant.

Plea: That the costs were not taxed by the Insolvent Court, at the instance of Brown, or the defendant, and that they had no notice thereof.

Replication: That, by the rules of the Insolvent Court, no notice was necessary, and that the costs were fairly taxed.

Special demurrer and joinder. In addition, the following (amongst other) objections to the declaration, were marked for argument: That the first count of the declaration is bad, on the ground that the taxation of the

plaintiff's costs is a condition precedent to the defendant's promise to pay them: performance of which is not sufficiently shewn, by an averment, that such costs were taxed by the Court for the Relief of Insolvent Debtors in England, or that they were taxed otherwise than in pursuance of the powers and authorities vested exclusively in one of her Majesty's superior Courts at Westminster, or the officers thereof: and that the Court for the Relief of Insolvent Debtors has no power whatever to tax costs.

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Flood, in support of the demurrer. The declaration is bad. It alleges a promise to pay the *plaintiff* his *taxed* costs; the taxation is, therefore, a condition precedent to the right to bring the action. It is accordingly averred, that the costs were *taxed* by the Court for the Relief of Insolvent Debtors in England. But that Court has no power to tax costs. The costs must be taxed by an *officer* of one of the superior Courts. The 27th section of the 1 & 2 Vict. c. 110, expressly provides, that the Insolvent Court, or any Commissioner thereof, *shall* not have the power of awarding costs against any person or persons whatsoever, except as permitted by the act; and then the 82nd, 87th, and 90th, sections, give power to award costs in certain cases, not material to the present inquiry. Although, therefore, the Insolvent Court has the power of awarding costs as between parties immediately before the Court, there is no ground for contending that it can *tax* the costs so awarded. The date of this contract does not appear, and, under the recent statute, 6 & 7 Vict. c. 73, an attorney may tax his own bill. (He was then stopped by the Court).

Gurney, contra. There is a taxing officer regularly appointed by the Insolvent Court. [*Parke*, B.—We have no judicial knowledge of any such officer.] There is nothing bad in law in such a taxation. [*Parke*, B.—Must not an attorney's bill be taxed by an officer of one of the superior

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Courts?] Such a practice would be attended with inconvenience, for the taxing officer of the superior Court would not be conversant with the practice of the Insolvent Court, or with the charges which an attorney of that Court is entitled to make. [*Parke, B.*—*Prima facie* taxed costs, mean, costs taxed by the proper authority. The Master would have no difficulty in ascertaining what was due.]

PER CURIAM.—Let there be judgment for the defendant, unless the plaintiff amend, on payment of costs, within a week.

Rule accordingly.

SMITH v. PARKER.

A declaration alleged that the defendant published the following libellous matter, of and concerning the plaintiff, as a schoolmaster: "During the last seven years no boys have received instructions at the school. The decay of this school seems mainly attributable to

CASE. The declaration, (after the usual introductory averment,) stated, that the plaintiff for a long time, to wit, thirty years, before and at the time of the committing of the grievances, &c., was, and still is, the master of a certain grammar school in the city of Lichfield, called the Free Grammar School, and had performed his duties as such schoolmaster with great credit and reputation, and without any violent or improper conduct on his part; that the plaintiff, during all the time aforesaid, was, and still is, a clergyman of the established church in England; yet the

the violent conduct of the Master. His treatment of two boys on two separate occasions subjected his modes of punishment to investigation before the magistrates, one boy having been subsequently confined to his bed under surgical advice for a fortnight." The defendant pleaded as to so much of the libel as imputed to the plaintiff, that during the last seven years, no boys had received instructions at the school of the plaintiff, and that the plaintiff's conduct as master of the said school had been violent, and that the plaintiff's treatment of a boy on one occasion subjected his, plaintiff's, mode of punishment, to investigation before the magistrates; that for seven years, no boys had received instructions at the plaintiff's school, and that on divers days and times he violently chastised certain scholars, and, on one occasion, so illtreated a scholar, that his mode of punishment was investigated before a magistrate: *Held*, on special demurrer, that the libel was not divisible; and that the plea was bad, for not shewing that the loss of scholars was occasioned by the plaintiff's violent conduct.

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defendant well knowing the premises, but contriving, &c., to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to hold him up to public contumely, scorn, and ridicule, and to vex, harass, oppress, impoverish, and wholly ruin the plaintiff, heretofore, to wit, on, &c., falsely, wickedly, and maliciously, did print and publish, and cause and procure to be printed and published, of and concerning the plaintiff, and of and concerning him, the plaintiff, as such schoolmaster and clergyman, as aforesaid, a certain false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, and defamatory matter following, of and concerning the plaintiff, and of and concerning him, the said plaintiff, as such schoolmaster and clergyman, that is to say:—"Lichfield Free School. In the Free Grammar School at Lichfield, the master of which, (meaning the plaintiff,) is unhappily a clergyman, the premises being valued at 50*l.*, the whole value of the situation was, for some years, 129*l.* 14*s.* 4*d.* As during the last seven years no boys have received instructions at the school, (meaning the aforesaid grammar school,) a gratuity of 35*l.*, formerly paid by the feoffees of the Conduit Lands, has been recently withheld under protest from the master, (meaning the plaintiff.) The decay of this school, (meaning the aforesaid grammar school,) seems mainly attributable to the violent conduct of the master, (meaning the plaintiff.) His, (meaning the plaintiff's,) treatment of two boys, on two separate occasions, subjected his, (meaning the plaintiff's,) modes of punishment to investigation before the magistrates, one boy having been subsequently confined to his bed under surgical advice for a fortnight." By means of the committing of which said grievances by the defendant as aforesaid, the plaintiff hath been, and is greatly injured in his good name, fame, and credit, as such schoolmaster and clergyman, &c.

Plea. As to the printing and publishing, and causing and procuring to be printed and published, so much of the

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said supposed libellous matter as imputes or charges to or against the plaintiff, that during the last seven years, no boys have received instructions at the school of the plaintiff, and that before the said time, when, &c., his, to wit, the plaintiff's conduct as master of the said Free Grammar School at Lichfield, had been violent, and that his, to wit, the plaintiff's treatment of a boy, on one occasion, subjected his, to wit, the plaintiff's, mode of punishment to investigation before the magistrates, (actio non;) because the defendant says, that in truth and in fact, for the last seven years, before the said time when, &c., no boys have received instructions at the said school of the plaintiff, and the defendant says, that long before the said time when, &c., to wit, on, &c., and on divers other days and times between that day and the said time, when, &c., he, the said plaintiff, did violently, immoderately, and improperly chastise, beat, bruise, and illtreat, divers of the scholars of his, the plaintiff's, said school, (that is to say,) one H. Eggington, one A. Shore, one J. Eborall, one G. Dean, one H. Walseley, and one J. Hawers, they, the said H. Eggington, A. Shore, J. Eborall, G. Dean, H. Walseley, and J. Hawers, respectively, being, when so illtreated by the plaintiff as aforesaid, boys under the tuition of the plaintiff, as master of the Free Grammar School at Lichfield, in the declaration mentioned; that the conduct of the plaintiff as master of the said school, was, upon the said several occasions above mentioned, and upon each of them, violent; that long before the said time, when, &c., to wit, on, &c., and shortly after the plaintiff had so violently, immoderately, and improperly chastised, beaten, bruised, and illtreated the said J. Hawers as above mentioned, one Elizabeth Hawers, the mother of the said J. Hawers, laid a complaint, in due form of law, before one Charles Edward Stringer, then being a magistrate in and for the city of Lichfield, against the plaintiff, for and on account of his, the plaintiff's, said ill treatment of her son, the said J. Hawers; and that afterwards, to wit, on the day and year last

aforesaid, the plaintiff appeared in his proper person before the said C. E. Stringer, to answer the said complaint and charge so made against him by the said Elizabeth Ann Hawers as aforesaid; that the treatment of the said J. Hawers by the plaintiff, and the mode of punishment of the said J. Hawers by the plaintiff, upon the occasion last above mentioned, as such master of the said school, was then subjected to investigation, and was then investigated in due form of law, by and before the said C. E. Stringer, so then being such magistrate as aforesaid; whereupon the defendant did afterwards, and at the time, when, &c., print and publish, and cause and procure to be printed and published, of and concerning the plaintiff, so much of the said supposed libellous matter in the declaration mentioned, as is in the introductory part of this plea mentioned, as the defendant lawfully might for the cause aforesaid. Verification, and prayer of judgment as to so much of the said supposed libel.

Special demurrer, assigning for causes, (amongst others,) that the plea is pleaded generally to the whole action, and yet attempts to justify only some part or parts of the libel; that the plea, if only pleaded to a part or parts of the libel, does not, with sufficient certainty, specify the peculiar part or parts which it professes to answer; that the part or parts of the libel which the plea attempts to justify, are not separable or divisible from the other parts of the libel; that the parts of the libel attempted to be justified by the plea, are immaterial of themselves, and without reference to the residue of the libel; that the plea does not allege or shew any decay of the said school, or that such decay is or seems mainly, or to any extent, attributable to any violent conduct of the plaintiff.

Martin (with whom was *Cole*,) in support of the demurrer. The plea affords no answer to the libel, it merely alleges that on one occasion the plaintiff was guilty of violent conduct. [*Parke*, B.—It is not averred in the plea, that

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the plaintiff was guilty of violent conduct to such a degree, as to cause a diminution in the school. Besides, the libel alleges that there was an investigation as to two boys, can the defendant justify as to one only?] It is submitted that he cannot. The gravamen of the libellous matter is not that the plaintiff improperly chastised the boys, but that his conduct was so violent as to occasion a decay of the school. The essence of the concluding part of the libel is the repetition of violent conduct; *Eaton v. Johns* (a).

The Court called on

Waddington, to support the plea. Each part of the alleged libel contains a distinct imputation, with reference to which the jury might be directed to give damages. There is, first, an allegation that no boys have received instruction in the school for seven years; that of itself, if maliciously spoken of a schoolmaster, is libellous. Such allegation is, therefore, divisible, and may be separately justified. The second imputation is that of violent conduct. [*Parke*, B.—Not merely violent conduct, but violent conduct to such an extent as to occasion a decay of the school.] That is only aggravation; the substance of the imputation is, that the plaintiff, as a schoolmaster, acted with violence. The details of the violence are set out in the plea, and it would be a question for the jury to say, whether they justified the imputation. That the decay of the school was caused by the violent conduct of the plaintiff, is a mere opinion of the writer. [*Parke*, B.—It is not libellous to say that the boys left the school, unless that was caused by the plaintiff's improper conduct: the plea does not allege that.] It is submitted, that such a statement falsely and maliciously made respecting a schoolmaster, would be libellous, though the decay in the school was not caused by his misconduct. [*Pollock*, C. B.—The plea professes to justify in the same sense as the complaint is made. The

(a) 1 Dowl. 602, N. S.

mere fact that no boys have received instruction in the school for seven years is wholly unimportant, unless such fact were occasioned by the misconduct of the plaintiff. The libel says, "the decay of the school," that is, no boys having attended for seven years "seems mainly attributable to the violent conduct of the master:" the plea wholly omits to connect the decay of the school with the alleged violence.] The two imputations are divisible, and may be justified separately. [*Parke, B.*—Have you any right to plead mere facts, without shewing that the imputations are true? You must justify in such a manner as to shew that the loss of the scholars was occasioned by the violent conduct of the master.]

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PER CURIAM.—There must be judgment for the plaintiff.

Judgment for the Plaintiff.

COOKE v. STAFFORD.

ASSUMPSIT by indorsee against acceptor of a bill of exchange.

Plea: that before the accepting of the bill, to wit, on, &c., the defendant, at one sitting and meeting, and on credit, lost to one J. M. Cooke, who then, at such sitting and meeting, and on credit, won of defendant a certain large sum of money, exceeding the sum of 100*l.*, to wit, the sum of 104*l.*, by gaming, and playing at a certain game, to wit, the game of vingt-un, contra formam statuti; that afterwards, and before the accepting of the said bill, to wit, on, &c., the defendant, at one sitting and meeting, and on credit, lost to the said J. M. Cooke, who then, at such

To assumpsit by indorsee against acceptor of a bill of exchange, the defendant pleaded, that at one sitting he lost to C., who won of him, a sum exceeding 100*l.* by gaming and playing at vingt-un; and that afterwards, the defendant, at one sitting, lost to C., who won of him, another sum exceeding 100*l.*

by gaming and playing at hazard; and that the defendant accepted the bill in part payment of those sums. At the trial, it was proved that the defendant and C. had played together at vingt-un and hazard, and that C. had won at the latter game; but there was no evidence that the defendant had lost at vingt-un: *Held*, that the Judge at nisi prius, might amend the plea under the 3 & 4 Wm. 4, c. 42, s. 23.

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sitting and meeting, and on credit, won of the defendant a certain other large sum of money, exceeding the sum of 100*l.*, to wit, the sum of 2,550*l.*, by gaming, and playing at a certain game, to wit, at the game of hazard, contra formam statuti; and the said several sums of money making together a large sum of money, to wit, the sum of 2,654*l.*, having been won and lost as aforesaid, and remaining wholly unpaid; it was thereupon, afterwards, to wit, on, &c., agreed, between the said J. M. Cooke and the defendant, that the payment of 500*l.*, parcel thereof, should be secured to the said J. M. Cooke, by the acceptance, by the defendant, of a bill of exchange, in writing, bearing date, to wit, on, &c., directed to the defendant, and requiring him to pay to the order of the said J. M. Cooke 500*l.*, two months after date thereof. Averment: That defendant accepted the said bill of exchange, in the declaration mentioned, in pursuance of the agreement in this plea mentioned, and for the purpose of securing to the said J. M. Cooke the said sum of 500*l.*, parcel of the said sum so lost by gaming and playing as aforesaid, and for no other purpose; and that there never was any consideration for or in respect of his, the defendant's, accepting or paying the said bill, other than the said sum so lost by gaming and playing as aforesaid; of all which premises, the plaintiff, before and at the time when the said bill was indorsed to him, as in the said first count mentioned, had notice. Replication, De Injuriâ.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings, after last Trinity Term, it appeared, that the bill of exchange in question, was one of five, for 500*l.* each, which had been accepted by the defendant for money won of him by J. M. Cooke, the brother of the plaintiff, at gaming. There was evidence that J. M. Cooke, and the defendant, had played together at vingt-un, and also at hazard; at which latter game J. M. Cooke won of the defendant more than the amount of the five bills; but there was no proof of the defendant's having lost at vingt-un. The jury found

that the bill was given for a gambling debt, incurred at the game of hazard, and that more than 100*l.* had been lost at one sitting. Under the direction of the learned Chief Baron, a verdict was found for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him, the Court to have the same power to amend the plea as the Judge at *Nisi Prius*.

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Crowder, having obtained a rule nisi accordingly,

Jervis (with whom was *Shee*, Serjt., and *J. Henderson*,) shewed cause, and contended there was evidence from which the jury might infer that the money was lost by the defendant, both at *vingt-un* and hazard. At all events, the Court (being, by consent, at liberty to make the same amendment as the Judge at *Nisi Prius* could have made,) would amend the plea, by striking out such part as related to the game of *vingt-un*, and then the plea would be good, under the statute of Charles the Second. Or, the Court might alter the plea so as to make it a good plea under the statute of Anne. He cited *Starkie on Evidence*, vol. 1, p. 436.

The Court then called on

Crowder and *Udall*, to support the rule. They argued, that there was no evidence to shew that the bill was given for money won at *vingt-un* and hazard together, or that anything was won at *vingt-un*. The plea, therefore, was not proved, the proposed amendment of it would be an alteration in a material part, and introduce an entirely new contract, *Brashier v. Jackson* (a).

POLLOCK, C. B.—We have to consider in this case, first, whether the plea was proved as framed; and secondly, if not, whether we ought to allow an amendment, and on what terms. It is said, that the substance of the plea,

(a) 8 Dowl. 784; S. C. 6 M. & W. 549.

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which states the contract, is not proved. It appears to me, that the objection is well founded. Where a plea states, as distinct independent matter, a variety of circumstances, any one or more of which might have constituted a good defence, I apprehend the rule of law to be, that it is sufficient to prove so much as will make out the defence. But in the present case, all the circumstances are bound together, for they all constitute one agreement, upon which it is alleged that the bill was given. It is therefore necessary to amend the pleas, if the defendant is to retain the verdict. Then the question is, whether this is an amendment which the Judge ought to have allowed at *Nisi Prius*, and one which the Court would, if allowed, have sustained. Now the statute (*a*) expressly says, that “when any variance shall appear between the proof and the recital or setting forth on the record of any contract;”—so that if there be a contract set out, whether in the declaration or in the plea, and whether it be in writing, or by parol, the statute seems to give a power to amend. Indeed it would be very great injustice, if it were not so, because, after adverting to the rules which regulate declarations and pleas (*b*), I find the rule, that “several counts shall not be allowed, unless a distinct subject-matter is intended to be established in respect of each;” and I can find no distinction between the counts of a declaration, and the several pleas which constitute a defence. It goes on, “nor shall several pleas be allowed, unless a distinct ground of answer, or defence, is intended to be established in respect of each.” Here, the defence is, that the bill was drawn and accepted with reference to a certain gaming contract. The contract intended to be set up as a defence, is the same, whether it be with reference to the playing at *vingt-un*, or playing at hazard. I think there can be no doubt that, before the New Rules, the pleas would have been framed with statements of a great variety of games; indeed, all the combinations of games which could be put together, for the purpose of meeting whatever might be proved at the trial. It appears to me, that we ought to

(*a*) 3 & 4 Wm. 4, c. 42, s. 23.(*b*) Reg. Gen. Hil. T. 4 Wm. 4.

give effect to the statute, in order to do justice under the New Rules; and that this being the statement of an agreement as to which there has been a mistake, we have authority under the statute, to make the correction, which in point of justice we ought to do. The only question is, on what terms the amendment ought to be permitted. As it may be said that the plaintiff has substantially succeeded in his application, since the plea was not proved as framed; it must be considered as if the plaintiff, having succeeded on that point, the defendant had applied to make an amendment, and deprive him of the benefit of his application. Therefore, I think the amendment ought to be allowed, upon payment of the costs of the amendment, and of the costs of this application.

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PARKE, B.—I am of the same opinion. As this plea is framed, I think it was necessary to have shewn that the bill of exchange was given on such an agreement, as is averred in the plea; which is an agreement that it should be in satisfaction, in part for money lost at hazard, and in part for money lost at vingt-un. There being no proof of the bills having been given for money lost at vingt-un, I think the plea fails on that ground, and that the plaintiff is entitled to succeed on his motion for the verdict to be entered for him. Then my Lord has reserved for the consideration of the Court the power of amendment, which he alone by statute could exercise; but which we, having by the consent of the parties, been put in the same place as my Lord at the trial, can now exercise; and the question is, whether this is a case in which a Judge at Nisi Prius would be entitled to amend under the statute. It appears to me to be very clear, that it is a case in which he is allowed to amend, and ought to amend; for it is only a misdescription of the matters of the agreement stated in the plea. The transaction is not altered by the amendment, but remains precisely the same. Therefore, I think that the amendment ought to be allowed. I entirely agree with the Lord Chief

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Baron as to the terms on which it should be made. The plaintiff has succeeded in the principal object of his application, and the defendant must be considered to be moving the Court at *Nisi Prius* to make the amendment; and, therefore, I think that the fair terms are, that he should pay the costs of that amendment; and, further, that he should pay the costs of the rule on which the plaintiff has succeeded.

GURNEY, B. concurred.

ROLFE, B.—I am of the same opinion. It seems to me that the only guide which the Judge at *Nisi Prius* can have as to making an amendment, is that pointed out by the act; namely, whether the amendment is or is not to correct a misstatement, not material to the interests of the case, and by which the opposite party cannot have been prejudiced. It is always a matter of some difficulty (it being an impossibility to arrive at an absolute certainty on such a point), whether the opposite party will have been prejudiced or not. One can only, therefore, say in a vague way, that one must look at all the circumstances of the particular case. Here, it seems to me utterly impossible to suppose the party could have been prejudiced. The fairest test of that is this: supposing the party comes with evidence that would enable him to meet the case as it stands on the record, unamended, would the same enable him to meet it as amended? Undoubtedly, the same evidence that would have sufficed to have met this plea as it stood, unamended, would have enabled the plaintiff to meet it as amended; and, therefore, in my opinion, it is proper the amendment should be made. I concur with the rest of the Court as to the terms on which it is to be amended.

Rule discharged. The plea to be amended on payment of the costs of amendment, and of this application; such costs to be deducted from the costs of the trial.

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THIS was an action against a surveyor for negligence in superintending certain repairs, alterations, and additions to a rectory house. The declaration contained three counts, and there were several pleas, upon which issues were joined. The cause, and all matters in difference, were referred by a Judge's order to an arbitrator, the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator found all the issues for the plaintiff, and assessed the damages at 280*l*. He also found that there were no matters in difference between the parties, other than the several causes of action in the declaration mentioned, and directed that the costs of the reference should be borne by each party in equal moieties. The Master allowed the plaintiff the costs of the pleadings as costs in the cause; but refused to allow him more than a moiety of the costs of the witnesses before the arbitrator, his attorney's charges and counsel's fees; on the ground, that such expenses were to be considered as costs of the reference, and not costs in the cause.

Where a cause, and all matters in difference, are referred to an arbitrator, who is to make an award; the costs of witnesses, &c. attending before him, are costs of the reference, and not costs of the cause.

Fish moved for a rule, calling on the defendant to shew cause why the Master should not review his taxation. The costs of maintaining the issues before the arbitrator, must be considered as costs in the cause. In *Mackintosh v. Blyth* (a), the arbitrator omitted to certify as to the costs of the reference, and it was held that they followed the verdict. [*Pollock*, C. B.—The certificate of an arbitrator is a totally different matter, for in that case all expenses are considered to be expenses in the cause. But where there is a reference to an arbitrator, who is to make an award, all proceedings before him are proceedings in the reference, and not in the

(a) 1 Bing. 269; See S. C. 8 Moore, 211.

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cause.] The case of *Tregoning v. Attenborough* (a), is in point. There, in an action of trover, a verdict was taken for the plaintiff for the full amount of the goods converted, the plaintiff consenting to take them back in reduction of damages, subject to the determination of an arbitrator under an order of *Nisi Prius*, as to the amount of the deterioration; the amount, together with the costs of the cause, to be paid by the defendant; it was held, that the expenses of the witnesses before the arbitrator were costs in the cause. *Taylor v. Gordon* (b), may seem at variance with the position contended for, but in that case, there was a reference of matters dehors the cause, and that fact is relied on by *Tindal*, C. J., who says, "Here a very large field of inquiry was opened before the arbitrator, quite independent of the question at issue in the cause." But in the present case, the arbitrator has expressly found, that there were no matters in difference, except those in the cause.

POLLOCK, C. B.—If the arbitrator intended that the plaintiff should have these costs, he ought to have awarded them.

PARKE, B.—Costs in the cause are costs up to the time of the reference.

Rule refused.

(a) 7 Bing. 733; See S. C. (b) 9 Bing. 570; See S. C. 2 M. 5 M. & P. 453; 1 Dowl. 225. & Scott, 725; 1 Dowl. 720.

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LIMBERT v. HAYWARD.

The Court granted a *distringas* to compel an appearance, where the defendant was in a lunatic asylum, and it appeared that his wife carried on his business.

HURLSTONE moved for a *distringas* to compel an appearance. The party attempting to serve the writ went to the defendant's house, and there saw his wife, who was

in a lunatic asylum, and it appeared that his wife carried on his business.

carrying on his business, and who said that her husband was in a lunatic asylum. Several applications were made at the asylum, but the keeper refused permission to see the defendant, or to allow the writ to be served upon him. In the case of *Humphreys v. Griffiths* (a), where the defendant was confined in a lunatic asylum, this Court allowed an appearance to be entered, upon affidavit of a refusal of admission to the defendant, and of notice to the keeper of an intention to enter an appearance. But since that case, the Judges have come to a resolution, that there shall be no equivalent for personal service, *Goggs v. Lord Huntingtower* (b); so that now the only course is to proceed by *distringas*.

The Court, at first, doubted whether a *distringas* ought to issue against the goods of a party who was non compos mentis, and confined in a lunatic asylum; but upon their attention being directed to the circumstance, that the wife was carrying on his business, they said the writ might issue, a copy to be served on the wife of the defendant, and another on the keeper of the lunatic asylum.

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Rule accordingly (c).

(a) 6 M. & W. 89.

12 M. & W. 503.

(b) *Ante*, Vol. 1, p. 599; S. C.

(c) *Banfield v. Darell*, *ante*, p. 4.

In re WHICHER,

and between WILLIAM WHICHER and JAMES THOMAS (a).

THIS was a rule, calling on one Whicher, an attorney, to shew cause why his bill of costs, charges, and disbursements, delivered to one Thomas, and for the recovery of

(a) The affidavits were entitled in the first instance in the cause of *William Whicher* and *James Thomas*; but being objected to

as being wrongly entitled under 6 & 7 Vict. c. 73, s. 43, were amended, by permission of the Court, as above.

The "special circumstances," under which a Judge may, by the 6 & 7 Vict. c. 73, s. 37, refer an attorney's bill for taxation, after verdict, must, in general, be cir-

cumstances newly come to the knowledge of the party, and upon learning which, he must apply promptly to the Court.

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which an action had been brought, should not be referred to the Master to be taxed. It appeared from the affidavits, that in May, 1843, Thomas applied to Whicher respecting the taxation of an attorney's bill, amounting to about 447*l.* which Thomas had incurred in preferring certain indictments against one Shewood. Whicher advised a taxation of the bills, stating, that at least 200*l.* would be struck off. The bills were thereupon delivered to Whicher to get taxed, when he gave the following undertaking:—

“Mr. J. Thomas has this day placed in my hands certain bills of costs of Mr. J. T., for the purpose of having the same taxed; and I hereby undertake not to put Mr. Thomas to any expense in consequence of such taxation; but that the expense, if any, shall be paid out of the money to be deducted from the taxation of such bills.”

Whicher declined to attend himself before the Master, and he recommended for that purpose an attorney of the name of Bozon. Thomas was afterwards obliged to pay Bozon a sum of 38*l.* for his charges; Bozon contending that he acted on his own account, and not as the agent of Whicher. Whicher then delivered to Thomas an unsigned bill for 36*l.* 8*s.* 8*d.*, for his charges in respect of the taxation (which was less than the sum taken off on taxation), and brought an action to recover the amount. The writ was dated the 16th August, 1843. Thomas let judgment go by default, and on the 3rd November, 1843, a fieri facias issued, under which the debt and costs were paid. The present rule, which sought to tax the bill of costs for which that action was brought, was moved on the 4th November, 1844.

Crowder shewed cause. The costs were not incurred for business done in Court, and, therefore, this Court has no jurisdiction, *Ex parte King (a)*, *Doe dem. Palmer v. Roe (b)*. The 6 & 7 Vict. c. 73, s. 37, provides, “that in case no part of such business shall have been transacted in any Court of law or equity, it shall be lawful for the Lord

(a) 3 N. & M. 437.

(b) 4 Dowl. 95.

Chancellor or Master of the Rolls to refer the bill for taxation." Secondly, the application is too late. After verdict or writ of inquiry executed in an action for the recovery of the costs, the Court cannot refer the bill for taxation, "except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for such reference shall be made." The term, "special circumstances," means facts which have newly come to the knowledge of the party, and of which he was not cognizant before action brought. But in this case, there is nothing which was not equally known to Thomas before the action.

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Jervis, in support of the rule. It is sufficient to give this Court jurisdiction, that the costs were incurred in the taxation of a bill of costs for business done in Court. The facts disclosed by the affidavits are "special circumstances" within the statute. The term does not mean circumstances intervening after action brought, but facts of a special kind. Under the old law, a party who paid a bill to which he had a defence, might afterwards apply to the Court for its taxation. [*Parke*, B.—A party never thought of taxing an attorney's bill after verdict, unless he had been taken by surprise, or had misconceived his case, and then he was bound to come within the four days allowed to set aside a verdict.] It appears that Thomas has been deceived by Whicher, who ought to have explained to him that he would have to pay Bozon's charges.

POLLOCK, C. B.—The rule ought to be discharged. It appears to me, that the "special circumstances," under which the Court will interfere after verdict, ought to be of some matter newly come to the knowledge of the party, and upon learning which, he should, with due diligence, apply to the Court. In this case, there is no fact of which the party was not fully aware nearly a year ago, and after acquiescing for that period, I think the Court ought not to

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interfere, at this distance of time. The rule ought to be discharged; but as Whicher does not deny the allegations contained in the affidavits, it must be without costs.

PARKE, B. concurred.

ROLFE, B.—In the case of *Lee v. Wilson (a)*, which was a rule to tax an attorney's bill after verdict, it was admitted on all hands that the application was unheard of before; and the Court took special care by imposing terms to prevent its being drawn into a precedent. Here we are asked, in effect, to set aside this verdict, because the defendant had a good defence to the action.

Rule discharged, without costs.

(a) 2 Chit. Rep. 63.

WALTON v. MASKELL.

A declaration stated that one J. was indebted to the plaintiff in 17*l.* 11*s.*, and thereupon, in consideration that the plaintiff would, for and on account of the said sum, accept the joint and several promissory notes of J. and one E. for payment of 17*l.* 11*s.*, six months

ASSUMPSIT: The declaration stated, that before and at the time of the making of the promise, &c., one J. Johnson was indebted to the plaintiff, in a large sum of money, to wit, 17*l.* 11*s.*; and thereupon theretofore, to wit, on, &c., in consideration that the plaintiff, at the request of the defendant, would, for and on account of the sum of 17*l.* 11*s.*, so due and owing from Johnson, accept and receive of and from Johnson, and one J. G. Elptrick, the joint and separate promissory note, in writing, of the said Johnson and Elptrick, bearing date the day and year aforesaid, whereby

and would thereby give time to J. for payment of the said debt; the defendant promised to pay the sum of 17*l.* 11*s.*, if the said promissory note were not duly honoured and paid. It then averred the acceptance of the note, and the non-payment of it when due, although the said J. and E. were afterwards requested so to do; and notice of the premises to the defendant; and alleged for breach the non-payment of 17*l.* 11*s.* by the defendant. The plea traversed the request to J. and E.: *Held*, on demurrer, that the plea was bad.

The giving a bill "for and on account" of a debt is, *prima facie*, an agreement to forbear enforcing payment of the debt, until the bill be due.

Johnson and Elptrick, jointly and separately, promised the plaintiff, six months after the date thereof, to pay to him, the plaintiff, or his order, the sum of 17*l.* 11*s.*; and would thereby give time to Johnson for the payment of the said debt of 17*l.* 11*s.*, until the said promissory note should become due and payable, according to the tenor and effect thereof; the defendant did then guarantee and promise the plaintiff to pay the sum of 17*l.* 11*s.* to the plaintiff, if the said promissory note for that amount was not duly honoured and paid by Johnson and Elptrick, or either of them, when the same should become due and payable, according to the tenor and effect thereof. It then averred, that the plaintiff, confiding in the said promise, did then accept and receive the said promissory note, of and from Johnson and Elptrick, for and on account of the said sum of 17*l.* 11*s.*, so due to him from Johnson as aforesaid, and did give time to Johnson for payment thereof, from thence until hitherto. **That** although the said promissory note afterwards, and before the commencement of this suit, to wit, on, &c., became due and payable according to the tenor and effect thereof; and Johnson and Elptrick were then, to wit, on the day and year last aforesaid, requested by the plaintiff so to do; yet that Johnson and Elptrick have not, nor hath either of them, paid the said sum of 17*l.* 11*s.*, in the said note specified, or any part thereof, to the plaintiff; and the said note hath been from thence hitherto, and still is, in the hands of the plaintiff, overdue, and unpaid; of all which premises the defendant then, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiff to pay him the said sum of 17*l.* 11*s.*; but the defendant hath not paid the same, or any part thereof.

Plea: That the plaintiff had not requested Johnson and Elptrick, modo et formâ.

General demurrer, and joinder therein.

The plaintiff's points for argument were, that the plea is no answer in law; for that it was not necessary in law to make any request to the said Johnson and Elptrick for the

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payment of the amount of the note : that as makers of the note, they were liable and bound to pay the same, without any request.

The defendants gave notice of the following objections to the declaration. That the defendant was only to be liable, if the note were not duly honoured and paid, an expression which implies that the holder was to present the note, and no presentment is averred. That the request ought to have been made by the holder, and when the note was due: neither of which points are averred. That the plaintiff was only to give time "thereby," (*i. e.* by taking the note,) until the note became due; and he does not state that he gave time, by taking the note; and he does by the word "hitherto," aver that he gave time for too long a period.

Knowles, in support of the demurrer. *Hitchcock v. Humfrey* (*a*) is an authority to shew that the plea is bad. There the defendant guaranteed the payment of goods supplied, "in consideration of the plaintiff extending the credit already given to his son, and agreeing to draw upon him at three months:" the defendant pleaded that the bill was not duly presented for payment, and that he had no notice of non-payment. *Tindal*, C. J., in delivering judgment, says, "This turns upon the question, whether one who guarantees the due payment of a bill, drawn upon a third person for the price of goods supplied to him, stands in the same situation as if he were in fact the drawer of the bill: for if such be his true position, then undoubtedly he is not liable to an action, unless there has been a due presentment of the bill, and he has had due notice of dishonour. But I can find no case that at all warrants that position. On the contrary, *Warrington v. Furber* (*b*), and *Swinyard v. Bowes* (*c*), are authorities to shew, that one

(*a*) 6 Scott, N. R. 540; See
S. C. 5 M. & G. 559.

(*b*) 8 East, 242.

(*c*) 5 M. & S. 62.

who is no party to a bill is not entitled to notice of its dishonour."

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The Court called upon

Martin, to support the plea. First, the request is a material and traversable averment. The contract of a guarantor has always been construed strictly, and his liability does not arise, except upon performance of a condition precedent. When a person guarantees the payment of a bill of exchange or promissory note, he understands that the bill or note requires a presentment for payment. This promissory note is payable to order, and there is no allegation that it was in the hands of the plaintiff at the time it became due. Suppose the bill had been indorsed over by the plaintiff, can it be supposed that the defendant is bound to search out the holder? [*Parke*, B.—Your argument only goes to shew that the defendant has made an improvident bargain: he ought to have specified the place of payment.] The word "dishonour" has a technical meaning, and implies that the bill has been duly presented. [*Parke*, B.—That is as against the drawer.] There is no reason for putting a different construction on the word "dishonour," in the case of a party liable on the face of the bill, and of one liable on a collateral undertaking. The meaning of the word is explained in *Lewis v. Gompertz* (a). [*Pollock*, C. B.—The plea traverses the request to pay. In an action against the parties themselves, the allegation of a request is mere form.] It is conceded, that when a party is primarily liable to pay, an allegation of request is unnecessary, the action itself being in law a request; but in this case the defendant only undertakes to pay if the bill be not *duly* honoured. The word "*duly*," means a non-payment on request. Secondly, the declaration is bad for want of an averment that the note was presented for payment. A party whose debt is secured by a bill of exchange

(a) 6 M. & W. 399.

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or promissory note, stands in a different situation from creditors holding other securities, *Hansard v. Robinson* (a). If the bill or note be lost, he cannot recover, and the party paying a bill or note has a right to the possession of it. The declaration is also defective in this; that the consideration stated is not that the plaintiff would give time; but that he would accept a promissory note, and "thereby" give time.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to the judgment of the Court. With respect to the last objection, the declaration expressly shews not only that the plaintiff did give time by receiving the note; but that he received it under circumstances, which compelled him to give time; the case of *Kearslake v. Morgan* (b), having decided that a creditor, who receives a negotiable instrument "for and on account" of a debt, is presumed to have received it in present satisfaction, and the receipt operates as a suspension of the remedy on the debt. As to the other question, it chiefly turns upon what the parties meant by the words "duly honoured and paid"—whether they intended anything more than the mere tautology, without any specific or definite meaning; or whether they meant "honoured," by being presented on the day when the note was due, or "paid" at any time afterwards. I cannot help thinking that the word "honoured" meant that the note should be presented at any time; and if "paid" at any time, the defendant should be discharged. The real question we have to decide is, whether the averment of a request has a different meaning in a declaration against the maker of a note, and in a declaration against a guarantor. It means the same thing in both cases, and it would be inconvenient to hold the contrary. As against the makers of the note, the allegation would be mere form, and it would be sufficient to say that they had not, nor had either of

(a) 7 B. & C. 90; 9 D. & R. 860.

(b) 5 T. R. 513.

them, paid the sum of money in the note specified. If sufficient as against them, it would be equally so against the guarantor. The contract in substance is, that the defendant guarantees that the makers of the note shall pay according to its tenor and effect, and they are bound to find out the holder and pay him. Inasmuch, therefore, as a presentment and request are immaterial, there must be judgment for the plaintiff.

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PARKE, B.—I am of the same opinion. The first question is as to the validity of the plea. The declaration is on a guarantee, and states that, in consideration, that the plaintiff would receive the promissory note of two persons, and thereby give time for the payment of a debt; the defendant promised to pay the debt, if the note were not duly honoured. It then proceeds to aver, that before the commencement of the suit, the note became due and payable according to its tenor and effect; and although the makers were requested so to do, they did not pay it; of which the defendant had notice. The plea traverses the request. Now, a request is quite immaterial, unless the parties to a contract have stipulated that it shall be made; if they have not done so, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him. It is clear, that the defendant is bound to pay the amount of the note when due and dishonoured; unless there be some condition precedent on the part of the plaintiff which has not been performed. Then it is argued, that the condition precedent is, that the note should be presented for payment; but it seems to me, that the words “honoured” and “paid” are tautologous, and simply mean, that the note shall be paid when it becomes due. What I am reported to have said in the case of *Lewis v. Gompertz* (a), coupled with the facts of the case, is perfectly correct. There is no doubt that a merchant reading the plea in that case, would necessarily

(a) 6 M. & W. 399.

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conclude that the bill was presented when due. A request is not necessary to charge the maker of a note,—he is bound to pay it when at maturity, and is bound to find out the person in whose hands the note then is. Upon this contract, the word “dishonour” means nothing **more** than the words “not duly paid.” As to the other point, the giving a bill “for and on account” of a debt is *primâ facie* an agreement to forbear enforcing payment of the debt, until the bill become due. I am, therefore, of opinion that the plea is bad, and that the declaration is good.

GURNEY, B., and ROLFE, B., concurred.

Judgment for Plaintiff.

GILL v. RUSHWORTH.

(*Before Rolfe, B., sitting alone.*)

Upon the return of a writ of trial, the plaintiff may tax his costs and sign final judgment; without waiting, as in other cases, until the expiration of four days.

IN this case, which was tried before the under sheriff of Yorkshire, a verdict was found for the plaintiff. The writ of trial was returnable on the 8th of September. Notice of taxation was given on the 9th, for the following day, and, accordingly, on the 10th, the costs were taxed, and final judgment signed. A summons was taken out before *Maule, J.*, to set aside the judgment, on the ground that it was prematurely signed, when the learned Judge referred the parties to the Court.

Montagu Chambers now moved for a rule, to shew cause why the judgment and subsequent proceedings should not be set aside for irregularity. Judgment ought not to have been signed until four days after the writ of trial was returnable; such is the practice in the Courts of Queen's Bench and Common Pleas; though in this Court, a different

practice seems to have prevailed. The practice in this Court rests upon the case of *Nicholls v. Chambers* (a). There, upon a writ of trial, the plaintiff, having obtained the verdict, taxed his costs and signed judgment on the same day; and the Court held, upon the construction of the 18th section (b) of the 3 & 4 Wm. 4, c. 42, that the judgment was regular. That case was decided on the 18th section, and the attention of the Court was not directed to the 19th section, which will be found, upon examination, to be important. That section follows as a proviso on the 18th, and enacts, "that all and every the provisions contained in the statute 1 Wm. 4, c. 7, shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon such writs of inquiry, and writs for the trials of issues, in like manner as if the same were expressly re-enacted herein." Under the provisions of that statute, a rule for judgment was required, and always given, until the 67th Rule of Hilary Term, 2 Wm. 4, provided, that after the return of a writ of inquiry, judgment might be signed at the expiration of four days from such return. [*Rolfe, B.*—Your argument would render the 18th section nugatory, for that section expressly says, that judgment shall be signed *forthwith*; and the former statute which you say is mentioned in the 19th section, provides the very same.] The words of the

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(a) 2 Dowl. 693; S. C. 1 C., M. & R. 385.

(b) Which enacts, "that at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or Judge before whom such trial shall be had shall certify under his hand upon such

writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry or trial, or a Judge of any of the said Courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order; and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as a verdict of a jury at *nisi prius*."

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19th section are very strong, "as if the same were expressly re-enacted therein." [Rolfe, B.—That is governed by the previous words, "so far as the same are applicable thereto," the 19th section re-enacts such of the provisions of the 1 Wm. 4, c. 7, only, as are not met by a contrary enactment.] It has been held, that the word "forthwith" cannot always be construed in its strict and ordinary meaning. It would be only reasonable to allow four days to elapse before signing judgment, and such, it is submitted, is the meaning of the two sections taken together.

ROLFE, B.—I think I ought not to grant a rule; the question has been already decided by the case of *Nicholls v. Chambers* (a).

Rule refused.

(a) 2 Dowl. 693.

The MAYOR, &c. of MACCLESFIELD v. GEE.

A defendant pleaded to a declaration several pleas, upon which issues were joined, and also a plea to the whole cause of action, to which the plaintiff demurred, and had judgment. The plaintiff afterwards discontinued. On taxation of costs, it appeared, that the costs to which the plaintiff was entitled on the demurrer, exceeded the costs which he had to pay on the discontinuance. The Master, therefore, deducted the latter from the former: Held, on motion to review the taxation, that the defendant might enter up judgment of discontinuance, and bring a writ of error; and, that if he intended to do so, the costs should be taxed separately; otherwise that the taxation was correct.

IN this case, the defendant had obtained a rule, calling on the plaintiffs to shew cause why the Master should not review his taxation, or why the rule to discontinue should not be set aside. The action was brought for disturbance of a market, and the defendant had pleaded several pleas, upon which issues in fact were joined; and also a plea going to the whole cause of action, to which the plaintiffs demurred, and, on hearing, the defendant had leave to amend on terms, one of which was, that if no writ of error were brought within a certain time, the plaintiffs should have leave to sign judgment. No amendment was made, nor any writ of error brought; and the plaintiffs accordingly signed judgment

on the demurrer. The plaintiffs afterwards took out the ordinary rule to discontinue, on payment of costs. On taxation, it appeared that the costs to which the plaintiffs were entitled on the demurrer, exceeded the costs which they had to pay the defendant on the discontinuance; the Master, therefore, deducted the latter from the former, and gave the plaintiffs his allocatur for the balance. It was objected, on the part of the defendant, that the taxation was wrong, on the ground that the plaintiffs, under the circumstances, were not entitled to set off the costs of the demurrer against the costs of the discontinuance, to which the defendant was entitled; the costs of the demurrer being, as it was argued, in the nature of interlocutory costs, and therefore lost by the discontinuance; and the plaintiffs having no right to judgment, on the present state of the record, for the balance. It was contended, also, that the rule to discontinue ought to be set aside; because the plaintiffs, by discontinuing, deprived the defendant of the means of carrying the record into a Court of Error; and because the rule to discontinue was contingent on the payment of costs, with which condition the plaintiffs had not complied.

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E. V. Williams shewed cause. The taxation is correct. Suppose, that instead of discontinuing, the plaintiffs had gone to trial, and been nonsuited; the general costs of the cause would have been allowed to the defendant, and the plaintiffs' costs on the demurrer would have been deducted therefrom. There is no difference in principle, because the plaintiffs' costs exceed those of the defendant. A discontinuance is like a judgment of nonsuit, and only means a termination of the suit by the failure of the plaintiffs to carry it on according to the course of law. Before the statute 2 Hen. 4, c. 7, a plaintiff, who was dissatisfied with his verdict, might have been nonsuited by non-appearance at the dies datus. That statute is, that "whereas, upon verdict found before any justice in assize of novel disseisin

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mort d'auncester, or any other action whatsoever, the parties before this time have been adjourned upon difficulty in law upon the matter so found, it is ordained and established, that if the verdict pass against the plaintiff, that the same plaintiff shall not be nonsuited." The statute 8 Eliz. c. 2, gives costs to the defendant, if the plaintiff "suffer the suit to be discontinued, or otherwise shall be nonsuit in the same," shewing that a discontinuance is the same in effect as a nonsuit. The form of entry of nonsuit, at Nisi Prius, is, "whereupon the plaintiff being solemnly called, comes not, nor does he further prosecute his suit against the defendant, therefore, &c." A nonsuit can only take place at the instance of the defendant (a), but the plaintiff has two modes of terminating the suit, either by nolle prosequi, or by discontinuance. It is only in modern times, that a nolle prosequi has not been considered as a bar to any future action. Formerly, it was held to be in the nature of a retraxit (b), and even now, a nolle prosequi as to part entered up after judgment for the whole, is a bar to any future action for the same cause, *Bowden v. Horne* (c). [*Pollock*, C. B.—Is there any instance of a writ of error, brought after nonsuit, upon the whole record? The plaintiff being out of Court altogether, it would seem that the writ is gone. It is different, where there is judgment on a demurrer; if it were not so, the plaintiff might go to trial on some immaterial issue, and then consent to be nonsuited, and so put an end to the suit, although the defendant's plea demurred to, might be a good bar to the action.] There does not appear to be any authority either way. It is in vain to look at the old books, as the question could not have arisen before the 4 Ann. c. 16, s. 5. By the rule of Hilary Term, 2 Wm. 4, r. 106, "to entitle a plaintiff to

(a) See *Arnold v. Johnson*, 1 Str. 267. But plaintiffs have been nonsuited in undefended causes; *Halhead v. Abrahams*, 3 Taunt. 81, and *Treacher v. Hinton*, 4 B. & A. 413; and see the judgment of

Mr. Justice Bayley in the latter case.

(b) Co. Litt. 139, a.

(c) 7 Bing. 216; See S. C. 5 M. & P. 756.

discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent, that if they are not paid within four days after taxation, defendant shall be at liberty to sign a non pros." That rule was expressly framed to give the defendant a remedy for his costs after a discontinuance. The entry of judgment of discontinuance, of non pros, and of nonsuit, are in terms the same; namely, "therefore it is considered by the Justices here, that the plaintiff take nothing by his said writ, but that he be in mercy, &c., and that the defendant do go thereof, without day, &c." *Brandt v. Peacock* (a) shews, that where the plaintiff discontinues, there is judgment of nonsuit, as in other cases. The objections raised would apply equally to a nonsuit at Nisi Prius. The plaintiffs, having succeeded on the demurrer, are entitled to costs by the 3 & 4 Wm. 4, c. 42, s. 34.

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J. Henderson, in support of the rule. On the present state of the record, there can be no execution for the plaintiffs. The case of nonsuit differs from this; for there the defendant might bring a writ of error on the judgment, and, if he succeeded, he would obtain the costs of the demurrer. The effect of a writ of error, is to cause the Court below to give that judgment which it ought originally to have given, *Gildart v. Gladstone* (b), *Peacock v. Harris* (c). But in this case the defendant cannot bring a writ of error. A discontinuance is by act of the Court, and no judgment is entered upon it. The rule of Hilary Term, 2 Wm. 4, requires that a rule to discontinue shall contain an undertaking on the part of the plaintiff to pay costs, and if they are not paid, the defendant is to be at liberty to sign judgment of non pros. If no such judgment is signed, there can be no writ of error, and consequently the

(a) 1 B & C. 649; See S. C. 3 D. & R. 2.

(c) 5 A. & E. 449; See S. C. 6 N. & M. 854.

(b) 12 East, 668.

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plaintiffs, by discontinuing, have deprived the defendant of the means of getting the costs of the demurrer. It is not like the case of a discontinuance after trial, where the plaintiff has been nonsuited, and a new trial ordered; in which case the defendant is not entitled to costs, *Jolliffe v. Mundy* (a). [*Pollock*, C. B.—Suppose a declaration, containing but one count and two pleas, each of which goes to the whole cause of action, and that to one of the pleas there is a demurrer, and judgment for defendant, issue is joined upon the other, and at the trial the plaintiff is nonsuited, and thereupon the ordinary judgment is given, that he take nothing by his writ; in that case, there would be a seeming incongruity on the record, since judgment would be given as to the whole cause of action, that the plaintiff take nothing by his writ, and at the same time there would be judgment that the defendant recover his costs on the demurrer: yet it is conceded that a writ of error might be brought on that judgment. If a discontinuance can be put on the same footing as a nonsuit, a writ of error will lie as well in the one case as in the other. *Parke*, B.—There is no difficulty in entering up judgment, on a rule to discontinue; the form is given in *Tidd's Forms*, p. 230, 8th ed.] Unless judgment of non pros. be signed, there can be no judgment, because the Court have declared that the proceedings shall go no further. A discontinuance is a termination of the suit for all purposes. [*Parke*, B.—There would be an entry on the record of judgment for the plaintiff, on the demurrer, and also of the judgment of discontinuance, and a transcript of the whole record would be taken up to the Court of Error.] Besides, the plaintiffs are bound by their agreement to pay costs on the discontinuance, which has not been done.

POLLOCK, C. B.—The rule must be discharged. It is argued on the part of the defendant; first, that the plaintiffs

(a) 7 Dowl. 225; See S. C. 4 M. & W. 502.

have no means of enforcing payment of the balance, and, therefore, that they ought not to be allowed it. That does not appear to me to furnish any argument for justice not being done to the extent to which it may be done, by the authority of the Court. The second ground of argument was, that these are interlocutory costs, and are, therefore, lost by the discontinuance; that also is no valid ground. If an interlocutory motion had been made by the defendant, and discharged with costs, the Master, when he came to tax the costs of the discontinuance, ought to deduct the costs of the interlocutory motion. Both upon principle and practice, it is clear that the costs of such interlocutory proceedings ought to be allowed. Thirdly, it is said, that by the discontinuance, the plaintiffs have deprived the defendant of the means of carrying the record to a Court of Error. It appears to me that this ground also fails; because, I apprehend, the judgment of discontinuance may be entered on the record at the instance of either party. In the case of discontinuance, the judgment is the same as on judgment of nonsuit; and I do not see why a writ of error may not equally be brought upon it. In the case of judgment of nonsuit, it may be, that there is some incongruity; since the judgment is, that "the plaintiff take nothing by his writ;" and, therefore, there is some difficulty in saying, that a judgment for him on any plea going to the whole cause of action, may be brought before a Court of Error. But it is, nevertheless, clear, that in some instances, there may be a writ of error on a judgment of nonsuit; and so also, I think, on a judgment of discontinuance. I give my opinion on the narrow ground, that I can see no reason for making a distinction between a judgment of nonsuit and a judgment of discontinuance. If a writ of error will lie in the one case, it ought also in the other.

PARKE, B.—With regard to the last ground of argument, namely, that the terms of the rule obliged the plaintiffs to pay costs on the discontinuance, and that they have not done

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so; all that the plaintiffs were bound by the rule to pay, were only such costs of the discontinuance as the Master should tax, and as the costs of the demurrer exceed those costs, they are not precluded by the terms of the rule, from insisting upon payment of the balance. Since the 3 & 4 Wm. 4, c. 42, there can be no difficulty in saying, that a writ of error will lie on this judgment of discontinuance. But then it is said, that there can be no writ of error, unless there be a judgment on the whole record, which is not the case here, as the discontinuance is an abandonment by the plaintiff of his suit. I am of opinion, that it is competent for the defendant to insist upon an entry on the record of judgment of discontinuance, which is in a form well known, and which states that the plaintiff voluntarily discontinues his suit, and takes nothing by his writ. When judgment is entered up, it will appear by the record that the Court have given judgment for the plaintiffs, on demurrer to a plea. The effect of that judgment is to give the plaintiffs a remedy for their costs of the demurrer; and if those costs exceed the costs which the plaintiffs have to pay on discontinuance, they are entitled to the balance; unless the defendant elect to bring his writ of error. The argument of Mr. *Henderson*, that the plaintiffs have deprived the defendant of the means of getting the costs of the demurrer, is unfounded. The defendant may insist upon the rule to discontinue being entered on the record in the proper form, as pointed out in *Tidd's Forms*. The result is, that if the defendant determine upon bringing his writ of error, the taxation ought not to be in the form in which it now stands; that is, the costs of the discontinuance deducted from those of the demurrer; because, if the defendant bring a writ of error, he may not be bound to pay costs, as the Court above must give the same judgment as the Court below ought to have given. The costs of the discontinuance should be taxed separately, and the costs of the demurrer taxed separately; but if the defendant does not bring a writ of error, that will be unnecessary.

ROLFE, B.—The rule was granted by me when sitting in the other Court, and the argument of Mr. *Henderson* then made an impression on me, because I assumed that the result of the discontinuance was, that the defendant would necessarily be deprived of his writ of error; if that were so, the greatest injustice would ensue. I am now satisfied that such is not the consequence of a discontinuance. If a plaintiff choose to discontinue, that is a proceeding which may be entered on the roll; and should it afterwards appear that an erroneous judgment has been given, it may be reversed. The rule of Court does not affect that proceeding, it merely says, that if the plaintiff shall fail to comply with the terms imposed, the defendant may be at liberty to sign judgment of non pros. Here the plaintiffs do, in effect, comply, and the defendant may enter up judgment on the discontinuance, which is similar to that of a nonsuit, “that the plaintiffs take nothing by their writ.”

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Rule discharged.

JONES v. NICHOLLS.

THIS was an action of trespass for false imprisonment against a constable acting under the provisions of the 1 & 2 Wm. 4, c. 41, and the 2 & 3 Vict. c. 93. The defendant pleaded not guilty by statute, and a verdict was found for the plaintiff, with 10*l.* damages. Before the writ issued, a notice of action had been given as follows:—

“To Richard Nicholls, one of the superintendents of police in the Denbighshire constabulary force, and Thomas Roberts, one of the constables of the parish of St. Asaph, in the county of Flint. I do hereby, as the attorney of and for Joseph Jones, of St. Asaph, in the county of Flint,

A notice of action to a constable under the 1 & 2 Wm. 4, c. 41, stated that the plaintiff would proceed for false imprisonment committed by the defendant; in “imprisoning the plaintiff at St. Asaph, on the 30th of January, on a charge of felony, and taking him

from thence in custody to Denbigh, and detaining him in custody upon the charge for twelve hours; and also for causing him to be taken before certain justices at Denbigh on the 31st of January, on the said charge:” *Held*, sufficient.

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victualler, according to the form of the statute in such case made and provided, give you notice that the said Joseph Jones will, at, or soon after, the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of her Majesty's Court of Exchequer, &c., against you, at the suit of Joseph Jones, and proceed thereon according to law, for trespass and false imprisonment committed by you, the said R. Nicholls and T. Roberts, by arresting and imprisoning the said Joseph Jones, with force and arms, at St. Asaph, in the said county of Flint, on Tuesday the 30th day of January last, on a charge of felony; and taking him from thence in custody to Denbigh, in the county of Denbigh, and for detaining him in custody upon such charge for twelve hours, or thereabouts; and also for causing the said Joseph Jones to be taken before divers of her Majesty's justices of the peace at Denbigh aforesaid, in the said county of Denbigh, on the 31st day of the said month of January, in the year aforesaid, on the said charge of felony: whereby the said Joseph Jones was greatly injured in his character, and forced to incur great expenses, to wit, about 20*l.*, in manifesting his innocence of the said charge: and other wrongs to the said Joseph Jones did, to his great damage of 100*l.*, and against the peace of our Lady the now Queen. Dated the 26th day of February, 1844." Signed by the attorney.

Welsby moved to set aside the verdict, on the ground that the notice was insufficient. The time and place of committing the alleged trespasses are not stated with sufficient certainty. It does not appear at what time the plaintiff was removed to Denbigh, and it is consistent with every thing alleged, that such removal was altogether a distinct transaction from the other grievance complained of. The notice does not aver that the twelve hours imprisonment was *next following* the taking. In *Martins v. Uppcher* (a),

(a) 2 G. & D. 716; See S. C. 3 Q. B. 662.

a notice of action against a magistrate under the 24 Geo. 2, c. 44, s. 1, which omitted all mention of the place where the trespass was committed, was held bad. And in *Breese v. Jerdein* (a), where a notice of action against a policeman under the 10 Geo. 4, c. 44, s. 41, stated, that on the 27th of May, the defendant caused the plaintiff to be apprehended and detained in custody for three hours, and afterwards caused him to be unlawfully committed to a certain common goal, called the Compter, and there imprisoned for a further space of twelve hours; the Court held the notice insufficient.

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POLLOCK, C. B.—We ought not to require too much strictness in notices of this kind; though I much doubt whether the notice in this case would not be sufficient, even if the question were raised on special demurrer. The notice states that the plaintiff was arrested at St. Asaph, in Flintshire, on the 30th of January, on a charge of felony; that he was taken from thence in custody to Denbigh, and detained in custody on *such charge* for twelve hours; and also that he was, on the same charge, taken before certain magistrates on the 31st of January. Suppose this latter portion of the trespass had been alleged to have been done “on the following day,” would not that have been sufficient?

PARKE, B.—This notice was intended to be read by a constable—most probably a man of ordinary capacity. Is it not such a one, that a plain man reading it, could have no doubt whatever as to the transaction to which it referred?

GURNEY, B., and ROLFE, B., concurred.

Rule refused.

(a) 2 G. & D. 720, note; See S. C. 4 Q. B. 585.

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STALWORTH v. INNS.

Where a matter is referred to the determination of two or more arbitrators: *Semble*, the award should be executed by all at the same time, and in the presence of each other.

THIS cause had been referred, by order of a Judge, to J. Bromley, and J. Matthews, or in case of their disagreeing, to such third person, as umpire, as they should appoint; the costs of the cause to abide the event of the award, and the costs of the reference and award, or umpirage, to be in the discretion of the arbitrators or umpire. An award was delivered, signed by Bromley and Matthews, by which it was awarded, "that the defendant pay to the plaintiff the sum of 1*l.* 19*s.* 11*d.*; that the plaintiff should bear and sustain all costs sustained by him, in and about the reference; that the plaintiff pay the defendant all costs sustained by him in and about the reference, and that the plaintiff pay the costs of the award."

A rule nisi had been obtained to set aside the award, upon the affidavit of Bromley, which stated, that it was finally agreed between him and Matthews, to find a balance of 1*l.* 19*s.* 11*d.*, due to the plaintiff; that the plaintiff should pay the charge for the attendance of the referees, the Inn bill incurred on the reference, and the charge for preparing the award, which items amounted to 12*l.* 13*s.* 6*d.*, and that all other costs and charges were to be paid by the defendant; that it was left to Matthews to instruct an attorney to prepare the award, and deponent and Matthews agreed to meet in Worcester, on the 20th of August, to sign the award; but that Matthews sent a messenger to deponent's residence, a distance of three miles from Worcester, about nine o'clock on the night of the 19th of August; and that deponent, at that late hour, signed the instrument without a careful perusal thereof, not doubting that it had been prepared as agreed on.

Alexander shewed cause. The award has been duly made and published, and the Court will not now interfere. It is objected by the other side, that the arbitrators did not

sign the award in the presence of each other; but that is not requisite. This case is distinguishable from *Little v. Newton* (a), for there the arbitrators did not finally agree upon their award. The language of *Tindal*, C. J., in delivering judgment, would shew that this award is good; he says, "if this objection had rested on no other ground than this, that the two arbitrators who signed the award, after having agreed upon the terms of their award when they last met together, had affixed their respective signatures thereto at different places and different times, we might perhaps have hesitated in holding the award to be void on that objection." In *Battye v. Gresley* (b), where the question was as to the validity of a warrant granted by commissioners of bankrupt, it was held, that the propriety of granting the warrant being a matter of discretion, must be determined by the commissioners acting together at one time; but the mere act of signing their names to the warrant might be done by them separately. [*Parke*, B.—The award should have been reduced into writing by the common consent of the arbitrators. The law requires that every judicial act done by several, should be completed in the presence of each other; non constat, but at the last moment one of them may have altered his opinion.] Here it appears, that both arbitrators had agreed on their decision, and instructed an attorney to draw up the award accordingly.

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Whateley and *Miller*, who were to support the rule, were stopped by the Court.

POLLOCK, C. B.—Perhaps the parties will agree to have the rule discharged without costs, with an intimation that the Court will grant no attachment or order to pay the sum awarded. If we were to decide a point of this kind, it should be upon a verdict, upon which judgment might be entered.

(a) 2 M. & G. 351; See S. C. 2 Scott, N. R. 509; 9 Dowl. 437.

(b) 8 East, 319.

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PARKE, B.—Joint judicial acts should be done by all parties in the presence of each other. In this case it would be wrong to set aside the award, because there would be no appeal against our decision; we ought, therefore, to leave the party to bring an action. But where an intimation of the strong opinion of the Court is known, it is to be hoped, that arbitrators will, in future, take care that the execution is joint.

Rule discharged, without costs, accordingly.

DOE dem. ROBERTS v. PARRY.

The sheriff's return to an *elegit* need not set out the lands by metes and bounds; it is sufficient to describe them by their names.

EJECTMENT for land, &c., in the county of Flint. At the trial before *Coleridge, J.*, it appeared that the lessor of the plaintiff, having recovered a judgment against a person of the name of Edwards, issued thereon a writ of *elegit*, to which the sheriff returned, that Edwards was “seised in fee of and in a dwelling-house and farm, with the appurtenances, commonly called and known by the name of Penyrorsedd, containing, by estimation, nineteen acres, situate, lying, and being in the parish of Northop, in the county of Flint aforesaid.” The declaration in ejectment stated a demise of several messuages, and twenty-five acres of land; but the tenant in possession defended for two messuages and twenty-five acres of land, called Rhosffarm, and also known by the name of Penyrorsedd Farm. It was objected, on the part of the defendant, that as the sheriff's return to the *elegit* described the premises as consisting of a dwelling-house and farm, and nineteen acres of land, the lessor of the plaintiff could not recover two messuages and twenty-five acres of land. The jury found a verdict for one cottage and twenty-five acres of land, and leave was reserved for the defendant to move to enter a verdict for him, or to limit the verdict to nineteen acres of land.

Jervis now moved accordingly. The inquisition is void for uncertainty, in not setting out the premises by metes and bounds. The practice in that respect has been long established; *Fenny v. Durrant* (a). The only question is, whether the 1 & 2 Vict. c. 110, s. 11, which enables the sheriff to take in execution the whole of a defendant's lands, has made any difference in this respect. There seems no reason why the premises should not be described with the same precision as before.

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POLLOCK, C. B.—There ought to be no rule. Since the sheriff is required by the 1 & 2 Vict. c. 110, to deliver possession of the whole of the defendant's lands, there is no necessity for him to set them out by metes and bounds. It is sufficient if he describe them with the same certainty as in a conveyance, that is, by their names.

PARKE, B.—It would seem from the precedent in *Moore*, p. 8, pl. 28, that formerly it was sufficient to describe the land with convenient certainty. Since the statute of Victoria, there seems to be no reason for setting it out by metes and bounds; it is enough to ascertain the estate by its general description. The form of a return to an elegit given in *Tidd's Forms* (b), is that the debtor was "seised in his demesne as of fee, of and in one messuage, and one close of pasture thereto adjoining, with the appurtenances, containing, by estimation, acres, more or less, situate, lying, and being in the parish of in the county aforesaid."

GURNEY, B., concurred.

ROLFE, B.—Where only a moiety of the land was delivered to the creditor, there was no other mode of distinguishing it, except by setting out the metes and bounds.

Rule refused.

(a) 1 B. & A. 40.

(b) p. 399, 8th ed.

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ARMANI v. CASTRIQUE.

A declaration against the drawer or indorser of a foreign bill of exchange must allege that the bill was made in parts beyond the seas : therefore, where the declaration omitted such allegation, and the defendant pleaded "that he did not indorse the said inland bill :"
Held, on special demurrer, that the plea was good.

Quære, if the indorsee of a bill of exchange be estopped from denying the drawing, or previous indorsement?

ASSUMPSIT by indorsee against indorser of a bill of exchange. The venue in the margin of the declaration was "London," and the declaration stated, "that one A. P. Appert, on the 31st July, A.D. 1840, made his bill of exchange, in writing, and directed the same to certain persons, using the name, style and firm, of Messrs. Foisel, Junr., & Company, by and under that name, style and firm; and thereby required the said last-mentioned persons to pay to the order of the said A. P. Appert, 740 francs, on the 31st January then next, which period had elapsed before the commencement of this suit; and the said persons so using the said name, style and firm, of Messrs. Foisel, Junr., & Company, by and under that name, style and firm, then accepted the said bill. And the said A. P. Appert then indorsed the same to the defendant, and the defendant then indorsed the same to one J. Zuliani, and the said J. Zuliani then indorsed the same to the plaintiff. And the said persons using the said name, style and firm, of Messrs. Foisel, Junr., & Company, did not pay the said bill, although the same was duly presented to them for payment on the day when it became due; of which the defendant then had notice; and in consideration of the premises, promised, &c. And the plaintiff avers that the said sum of 740 francs, in the said bill of exchange mentioned, being foreign coin, at the time of the making of the said bill, and the acceptance thereof, amounted to, and was of the value of 29*l.* 1*s.* 6*d.* of lawful money, &c."

Pleas: First, that A. P. Appert did not make or draw the said inland bill of exchange modo et formâ. Secondly: that the said A. P. Appert did not indorse the said inland bill, &c. Thirdly: that defendant did not indorse the said inland bill, &c. Fourthly: that J. Zuliani did not indorse the said inland bill, &c. Fifthly: that the said inland bill was not duly presented for payment, &c. Sixthly: that

the defendant had not due notice of the non-payment of the said inland bill, &c.

Special demurrer to the first and second pleas, assigning for causes, (together with those also assigned to the other pleas), that the defendant is estopped by his indorsement from traversing or denying the making or drawing, and also the indorsement of the said bill by A. P. Appert.

Special demurrer to the third, fourth, fifth and sixth pleas, assigning for causes, that the pleas deny the indorsement, presentment, and notice of dishonour, of an inland bill; whereas the plaintiff is entitled to prove the indorsement, &c., of a foreign bill: that each of the pleas denies a fact not averred in the count: that each of the pleas is double in this, that it denies the making of the bill, and also that the bill is an inland bill.

The Court called on

Peacock, to support the pleas. First, as to the third, fourth, fifth and sixth pleas, it is submitted, that as the declaration does not allege that the bill was drawn in parts beyond the seas, the necessary implication is, that the bill is an inland bill, and consequently the defendant has a right in his traverse to treat it as such. In *Jeffreson v. Morton (a)*, a writ of scire facias, on a recognizance, alleged that R. Y. was seised in fee of certain dwelling-houses, and the plea traversed that he was sole seised in fee. In the note (b) to that case, it is said: "It is not expressly alleged, in the writ of scire facias that R. Y. was sole seised in fee, but a sole seisin seems necessarily implied from the words, 'which were of the said R. Y. at the time of the recognizance of the said debt or ever after,' for the defendants would not otherwise be liable: And it is a rule of pleading, that whatever is necessarily understood, intended and implied, is traversable as much as if it were expressly alleged. As where in replevin the defendant said that A. was seised

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(a) 2 Wms. Saund. 6.

(b) Note 14.

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in fee of the place in which, &c., and by his command he took the cattle damage feasant; the plaintiff pleaded that he was seised in fee of a third part thereof, and traversed that A. was sole seised. The traverse was held proper, for by pleading that A. was seised in fee, it must necessarily be understood that he was *sole* seised, and therefore the plaintiff not only might but was bound to traverse the sole seisin." The 8th Rule of Hilary Term, 4 Wm. 4, Part II, directs, "that the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading." It follows, therefore, that the statement in this declaration, that Appert made his bill of exchange, means, that he made it at the place mentioned in the margin, which is London. A declaration on a foreign bill of exchange must aver a protest, *Gale v. Walsh* (a): there is no such averment here; and as it must be assumed that the declaration is good, it can only be so upon the supposition that it is on an inland bill. In *Kearney v. King* (b), the declaration stated that a bill of exchange was drawn and accepted at Dublin, to wit, at Westminster, &c., for a certain sum therein mentioned, without alleging it to be at Dublin, in Ireland; and it was held, that the bill, upon such declaration, must be taken to have been drawn in England, for English money, and therefore proof of a bill drawn at Dublin, in Ireland, for the same sum, in Irish money, did not support the declaration. [*Parke*, B.—Ought you not to have pleaded that the bill was not an inland, but a foreign, bill?] It might be said, on the authority of *Salomons v. Stavely* (c), that such objection was only ground of special demurrer. [*Pollock*, C. B.—Suppose that, in truth, it be a foreign bill, and the plaintiff have omitted something which he ought to have stated;

(a) 5 T. R. 239.

(b) 2 B. & A. 301; See S. C.

1 Chit. 28.

(c) 3 Doug. 298.

has the defendant therefore a right to assume that it is not a foreign bill?] The plaintiff could not support this declaration, at the trial, by producing a foreign bill. [*Parke, B.*—Admitting that you could not plead that this was a foreign bill, how can you plead that it is an inland bill?] This declaration is according to the form given by the Rule of Trinity Term, 1 Wm. 4, for declaring on an inland bill. There is no form of declaration on a foreign bill, but the Rule provides, that “declarations on foreign bills may be drawn according to the principle of those forms, with the necessary variations.” If a plaintiff were to allege in his declaration that he made a contract, which, according to the law of England, only required certain formalities, but which, by the foreign law, would not be valid, unless certain other requisites were complied with; how could the defendant take advantage of the mode of declaring, except by pleading that the contract was not made in England, but in a foreign country? If this be a foreign contract, a special plea of the defendant’s bankruptcy would afford no answer to the action. [*Pollock, C. B.*—I have no doubt but that it would. As the goods of a bankrupt all over the world are vested in his assignees, he is discharged by his certificate. It would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to allow a foreign creditor to come and sue him here.] In *Phillips v. Allan* (a), it was held, that the discharge of an insolvent debtor, upon a *cessio bonorum*, in Scotland, is no answer to an action by an English subject in this country, to recover a debt contracted in England. [*Pollock, C. B.*—That is correct; but it does not shew that an English certificate is not an answer to every contract by the bankrupt in any part of the world.]

As regards the first and second pleas, there is no authority to shew that an indorsee is estopped from denying the making or indorsement of a bill by the drawer. The

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(a) 8 B. & C. 477; See S. C. 2 M. & R. 576.

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case of a drawer is distinguishable from that of an acceptor: if the drawer did not make the bill, there was not a drawing upon which the acceptance could take effect. [*Pollock*, C. B.—A bill may be accepted, in blank.] At any rate, the estoppel should have been pleaded, as in the case of *Sanderson v. Collman* (a).

Dowdeswell, in support of the demurrer. This being an action on a contract which is transitory, the place of making the bill is fixed in a particular county, merely for the sake of ascertaining whence the jury should come. Any plea, therefore, which puts that place in issue is bad; as was decided in *Holbech v. Bennett* (b), where a plea to an avowry in replevin, putting in issue the place at which the lease was made, was held to be bad. The reason assigned was, that the party would have been at liberty to prove a lease made elsewhere than the place alleged. The plea, in the present instance, is objectionable on the same ground; as the plaintiff would be as much at liberty upon this declaration to prove a bill made in Paris, as a bill made at York, the venue being London. That he would be entitled to do so, is shewn by *Houriet v. Morris* (c); where, upon a declaration on a promissory note, alleged to have been made in London, the plaintiff was allowed by Lord *Ellenborough* to prove a note made at Paris. [*Parke*, B.—The answer to that case would be, that there is no difference between a *note* made abroad and one made in England, as the doctrine of protest does not apply to an action against the maker of a *note*]. That decision, at least, disposes of the argument, that the plaintiff ought to have stated the bill to have been made abroad, in order that the contract being governed by the *lex loci*, the defendant might have a defence under the foreign law. If he had any such defence, he might have set out the precise place of making

(a) 4 M. & G. 209; See S. C. (b) 2 Lev. 11; S. C. 2 Saund. 317.
 4 Scott, N. R. 638. (c) 3 Campb. 303.

it, without incurring the objection of a variance. Thus, in an action for an assault in one county, the defendant may state that it was committed in another county, where he has a local justification as bailiff, or otherwise. So in *Mostyn v. Fabrigas* (a), the governor of Minorca might have alleged the arrest to have taken place there, and justified it under the local law; though it had been stated to have occurred in the parish of St. Mary-le-bow, in the ward of Cheap, in the city of London. The ground of these decisions is, that in all transitory actions, like the present, the venue is mere matter of supposal, for the sake of conformity. The only question, therefore, is, whether a declaration on a foreign bill of exchange forms an exception to this general rule; because, as against the drawer, or subsequent party, it would be bad for want of an averment of protest, if the fact were truly stated. After the case of *Houriët v. Morris* (b), it cannot be contended that it would be held to be a variance, to produce a foreign bill in a declaration like the present, against the acceptor; and it would be a singular inconsistency, if the plaintiff could recover upon a declaration against him, and yet, that upon a declaration in the self same terms against the drawer, or subsequent party, the Court should hold that there was a fatal variance. The only mode by which the defendant could take an objection to the declaration, if it stated the bill to have been made abroad and the protest were annulled, would be by special demurrer, *Salomons v. Staveley* (c); which shews that it is merely matter of form: yet the effect of allowing him to traverse the place of making, would be to render it matter of substance. All that the defendant is deprived of, is a mere formal objection, and not of any substantial right; for the protest is part of the presentment, and notice must be proved under a traverse of those facts. The case of *Rogers v. Stevens* (d), shews that to be so; for there there was no averment of protest upon a foreign bill; and upon its being objected, as a ground of nonsuit, that

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(a) 1 Cowp. 161.
(b) 3 Campb. 303.

(c) 3 Doug. 298.
(d) 2 T. R. 713.

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none was proved, Lord *Kenyon* thought the objection was well founded and admissible; whereupon the plaintiff proved facts dispensing with protest for non acceptance, and also proved a protest for non-payment, and notice of it to the defendant. Upon that proof the plaintiff recovered, and subsequently retained his verdict after motion. [*Parke*, B.—It does not appear, from the report in that case, whether the declaration did or did not state the bill to be a foreign bill]. It must be assumed that it did not, or the defendant would have demurred. The plaintiff has declared upon a bill generally, and may prove any bill; and his case ought not to be crippled because, by a general and wider mode of pleading, he has obviated a special demurrer to the mode of stating a matter which is substantially alleged. This is one of those instances in which, if a party state his case with greater particularity than is necessary, he must shew that he has complied with all the conditions annexed, which he chooses to set forth; when he might have avoided the necessity for doing so, by a more general mode of pleading. But at all events, if there be any case in which this may be a foreign bill, and yet made and accepted in London; the plea is bad for describing it as an inland bill. Thus it may have been drawn in London, on a person at Paris, and accepted by his agent in London, and so though it was not an inland bill, it would still have been made as alleged. There are also cases in which protest is dispensed with; and the inference sought to be drawn from the omission of protest, that this is an inland bill, would be unfounded. The acceptor might come to London, and it might be presented to him here when it became due. Thus in *Robins v. Gibson* (a), it was held, that where the drawer made a bill abroad, and returned to this country before it became due, notice of protest to him was unnecessary. *Cromwell v. Hynson* (b), is to the same effect. To hold that a remote indorsee was bound to state where the bill was drawn or accepted, would be imposing

(a) 1 M. & S. 288.

(b) 2 Esp. 511.

a great hardship, and sometimes an impossibility; for it may be dated at some place bearing a name which occurs in England, a thing of no uncommon occurrence in America and the Colonies. The plaintiff could only rely on the stamp in such a case, but this might afford him no clue; and at all events, stamps are of modern introduction, and cannot affect the rules of pleading. *Kearney v. King* (a), was a case purely of variance; the declaration stated the bill to be for English, whereas it was for Irish currency, and was just the same case, as if it had misstated the amounts payable under it.

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With respect to the estoppel, *Schultz v. Astley* (b), and *Sanderson v. Collman* (c), are authorities that a person, by becoming a party to a bill, gives credit to the signatures previously attached, and is estopped from disputing them. If, at the trial, the plaintiff proved the defendant's subsequent indorsement, it would preclude him from disputing the fact of the genuineness of them; and being estopped in evidence, he is estopped in pleading. The whole of the cases are cited and commented upon in the last case, and they shew how the Courts have rendered, by degrees, this rule more stringent. [*Pollock*, C. B.—The plaintiff replied the estoppel in that case, surely you ought to have done so here.] Where an estoppel appears upon the declaration, it is unnecessary to do so; thus, a defendant cannot plead that the plaintiff nil habuit in tenementis, if the demise be stated in the declaration to have been by deed; *Veale v. Warner* (d). The plaintiff need not prolong the pleading, but may demur at once, *Rowe v. Ames* (e).

Cur. adv. vult.

The judgment of the Court was delivered by

POLLOCK, C. B. (After shortly stating the pleadings,

(a) 2 B. & A. 301.

(d) 1 Wms. Saund. 323, b.

(b) 2 Bing. N. C. 514; See
S. C. 2 Scott, 815.

(e) 6 M. & W. 747; See S. C.
8 Dowl. 750.

(c) 4 M. & G. 209.

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his Lordship proceeded thus:—We are clearly of opinion, that in an action against a drawer or indorser of a foreign bill, the declaration ought to state that it is a foreign bill; as there are different consequences resulting, and different rules of law applicable to a foreign bill, as compared with an inland bill. All the authorities that bear upon the question at all, are in favour of this view. In the very learned book of Mr. Justice *Bayley* on bills of exchange, it is so distinctly and expressly laid down; and we cannot find that there is any contrary decision, or even dictum. It appears to have been the invariable practice and understanding of the profession, that the declaration on a foreign bill, as against the drawer or the indorser, should state it to be a foreign bill. It seems to us, therefore, that the argument of the defendant is right; that if a bill be declared upon, as against an indorser, as an inland bill, it must be considered to have been, in point of fact, an inland bill; and the defendant has a right so to treat it, and to exclude any ambiguity by so calling it. The four last pleas would, therefore, be good; and upon the demurrer to them, the defendant would be entitled to judgment. The plaintiff would, therefore, most probably wish to amend.

With respect to the two first pleas, we should wish to look into the authorities cited in the case from the Court of Common Pleas (a), in order to see how far the indorsement is an estoppel between these parties, if we be called upon to give any judgment. The case in the Common Pleas did not distinctly decide that point. All that was there decided was, that as against the acceptor of a bill, his accepting it estops him from disputing the drawing. At the same time it will be admitted, that there can be no doubt, that if the matter of estoppel appear on the pleadings, then it is not necessary to reply the estoppel; but the party may avail himself of it by demurrer. As the plaintiff must amend with respect to the other pleas,

(a) *Sanderson v. Collman*, 4 M. & G. 209.

he, perhaps, would amend as to these also; inasmuch as they raise issues, which, (whether it be competent in point of law, to the defendant to raise, or not,) his indorsement is strong, cogent, and almost irresistible evidence to prove. Indeed, one can hardly conceive any state of facts in which a jury would not be directed, and would not readily adopt the suggestion, that the evidence arising out of the fact of the indorsement is conclusive as to the drawing and the prior indorsement. Such being the case, the plaintiff may, if he wishes, amend with respect to these pleas also.

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Amendment accordingly.

WOOD v. PEYTON.

IN this case judgment had been given for the plaintiff on demurrer to a replication (a), and there were also pleas upon which issues were joined. The plaintiff proceeded to trial, and obtained a verdict. The venire was only to try the issues joined.

Where judgment had been given for the plaintiff on certain issues in law, and, on the subsequent trial of the issues in fact, the plaintiff obtained a verdict; the Court refused to set aside the trial, on the ground that the venire juratores was defective, in not being tam ad triandum quam ad inquirendum.

Humfrey moved for a rule, calling on the plaintiff to shew cause why the trial, and all subsequent proceedings, should not be set aside for irregularity, on the ground that the jury process was defective. Whenever the record contains issues in law as well as in fact, there should be a special venire "tam ad triandum quam ad inquirendum." In *Codrington v. Lloyd* (b), there were issues in law and in fact upon pleas to the same count, and the plaintiff obtained judgment on the issue in law, and then proceeded to try the issue in fact; and it was held, that the jury process must be awarded to assess damages on the issue in law, as well as to try the

(a) *Ante*, p. 172.

(b) 8 A. & E. 449; See S. C. 1 P. & D. 157.

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issue in fact, although the latter went to the whole cause of action. There is no difference between that case and the present; except that there the application was to set aside the issue and notice of trial, here the motion is to set aside the trial.

PER CURIAM (a).—There ought to be no rule. It does not appear that the defendant has been prejudiced by the error; and if we were to grant a rule, the plaintiff might apply to amend the jury process. We have refused in similar cases (b) to interfere. The defendant may, if so advised, bring a writ of error.

Rule refused.

(a) *Pollock*, C. B., *Parke*, B., and *Cheese v. Scales*, 2 Dowl. 438, and *Alderson*, B. N. S.; 10 M. & W. 488; S. C.

(b) See *Gee v. Swan*, 1 Dowl. In Error, *ante*, vol. 1, p. 657; 896, N. S.; S. C. 9 M. & W. 685; S. C. 12 M. & W. 685.

GOLDTHORPE v. HARDMAN.

A declaration stated that the defendant wrongfully caused to be kept and continued large quantities of dirt and rubbish, before then, wrongfully placed upon a public highway, near a wall and a canal; by means whereof, the plaintiff, passing along the highway, was induced and caused to walk over the rubbish, and to fall into the canal.

Plea, not guilty: *Held*, on motion in arrest of judgment, that the declaration was good.

CASE. The declaration stated, that before and at the time of the committing of the grievance, &c., there was a certain common and public highway, for all the subjects of our Lady the Queen to pass and repass, at their free will and pleasure, &c.: yet the defendant, well knowing the premises, wrongfully and injuriously caused to be kept and continued divers large quantities of materials, dirt, and rubbish before then, wrongfully and injuriously put and placed in and upon the said common and public highway, near and at the side of a certain wall then standing and being near to, and on the side of the said highway, and near to a certain canal of water: by means whereof, afterwards, to wit, on, &c., to wit, in the night, the plaintiff then lawfully going and passing in and along the said highway,

was induced and caused to walk and pass on and along, and over the said several quantities of materials, dirt, and rubbish; and also to slip and fall, and did then slip and fall over the said wall on to the said earth, and the stones and soil thereof, and thence into the said canal; whereby, &c. Plea, not guilty.

The cause was tried before *Pollock*, C. B., at the York Summer Assizes, when a verdict was found for the plaintiff.

W. H. Watson moved to arrest the judgment, and argued that the declaration was bad; inasmuch as it was consistent with every allegation, that the accident arose from the plaintiff's negligence, and that he might have avoided it by ordinary care; *Butterfield v. Forrester* (a), *Marriott v. Stanley* (b).

Cur. adv. vult.

On a subsequent day,

POLLOCK, C. B., after stating the declaration, said—On the face of this declaration there is a clear statement of injury, followed by damages to the plaintiff; and, therefore, the declaration may be supported. It is averred that the materials were wrongfully kept and continued by the defendant upon the highway; by means whereof, the plaintiff, whilst lawfully walking along the highway, was caused to walk on and over the materials, and to fall into the canal. We can see no distinction between this case and that of a man who drives his carriage over a heap of rubbish, laying in the highway, and upsets the carriage. Whether the plaintiff could, by ordinary care, have avoided the accident, has been decided by the jury.

Rule refused.

(a) 11 East, 60.

(b) 1 M. & G. 568; S. C. 1 Scott, N. R. 392.

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TURNER v. PARKER.

A defendant in custody by virtue of a capias issued by order of a Judge, is not entitled to be discharged, by reason of the plaintiff not having declared against him within a year; but the proper course is to proceed by judgment of non pros.

THE defendant in this case had been arrested, and was in custody, on the 27th of April, 1843, by virtue of a writ of capias issued by order of a Judge. At the same time a writ of summons was served upon him, but no further proceedings had been taken.

Hance now moved for a rule to shew cause why the defendant should not be discharged out of custody, on the ground that the plaintiff had not declared against him within a year. He referred to the rule of H. T., 2 Wm. 4, r. 35, which provides that a plaintiff shall be deemed out of Court, unless he declare within a year after the process is returnable. [*Parke*, B.—The defendant should have proceeded to sign judgment of non pros.] He had not appeared to the action, and was, therefore, not in a situation to do so. [*Gurney*, B.—Then he cannot apply to the Court now.]

PER CURIAM (*a*).—The present writ of capias is wholly collateral to the action, and a party arrested under it cannot be considered in custody on process in the ordinary sense. The defendant can only procure his discharge by obtaining judgment of non pros.

Rule refused (*b*).

- (*a*) *Parke*, B., and *Gurney*, B. Vol. 1, p. 866, and *Walker* v. *De*
 (*b*) See *Ireland* v. *Berry*, *ante*, *Richmont*, *post*.

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WHITMORE and Another, Assignees of JOHN and JAMES
SHURRY, Bankrupts, v. BLACK, and Another.

TROVER by the plaintiffs, as assignees of John and James Shurry, bankrupts. The defendants paid 1*l*. into Court, and pleaded no damages, ultra; upon which issue was joined.

At the trial, before *Pollock*, C. B., at the London Sittings after last Trinity Term, it appeared that, in the year 1839, the bankrupts being indebted to the defendants, had given to them a warrant of attorney, upon which judgment was entered up on the 17th June in the same year. On the 21st June, the fiat issued, and on the 25th, the defendants issued a fieri facias, and levied on the goods of the bankrupts. Notice having been given to the sheriff not to sell, he applied for relief, under the Interpleader Act, when an order was made by *Patteson*, J., that the goods should be sold, and the money brought into Court, and that an issue as to the title of the goods should be tried, in which the execution creditors were to be plaintiffs, and the assignees, defendants. The assignees made no objection to this mode of disposing of the property, and the goods were accordingly sold by auction; but fetched far less than their alleged value. The execution creditors afterwards abandoned their claim to the goods, and the proceeds of the sale were paid out of Court to the assignees. The present action was brought to recover the difference between the alleged value of the goods at the time of the seizure in execution, and the amount produced by the sale. The learned Judge directed the jury, that if they thought that the sale was fair, and bonâ fide, they ought to find a verdict for the defendants. The jury found for the defendants, and leave was reserved for the plaintiffs to move to enter a verdict for them, for an amount to be determined

By the terms of an interpleader rule, by which an issue was directed to be tried between the execution creditors as plaintiffs, and the assignees of a bankrupt as defendants, to decide the title to certain goods seized under a writ of fieri facias; the sheriff was directed to sell the goods, and pay the proceeds into Court, to abide the event. The assignees made no objection to these terms. The execution creditors afterwards abandoned their claim: *Held*, that in an action against them by the assignees to recover the difference between the amount for which the goods were sold, and their alleged value; the jury were properly directed in estimating the damages, to consider, whether the sale was a fair and bonâ fide sale; and if so,

to assume that the amount realised by it, was the real value of the goods.

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by an arbitrator, if the Court should think them entitled to recover.

Humfrey now moved accordingly. The plaintiffs are entitled to recover the difference between the real value of the goods and the amount produced by the sale. The defendants, by abandoning their claim, have admitted that they had no title to the goods. In *Glaspoole v. Young* (a), it was held, that a sheriff, who wrongfully seized the goods of a stranger, was liable in trover for the value of the goods, although it exceeded the price for which it was sold. *Clark v. Nicholson* (b), is an authority to the same effect. [*Pollock*, C. B.—In *Glaspoole v. Young*, the party whose goods were seized was under no obligation to sell them, and was therefore entitled to be placed in the same situation as when the goods were taken; but here, the assignees were bound to sell the goods, and if they considered that a sale by auction was ruinous, they should have interposed when the matter was before the Judge. In the course of my experience, I never knew a case in which the plaintiffs had recovered, under circumstances like the present.] The defendants have committed a tortious act, and are answerable in damages.

PARKE, B.—The question was properly left to the jury, and there is no ground for a rule. There is a distinction between the case of an individual whose goods are wrongfully seized, under an execution, and that of the assignees of a bankrupt; for it must always be borne in mind, that the latter are bound to sell the goods. The measure of damage is the value of the goods at the time of the conversion. Then, if the assignees are bound to sell, the value is only what the goods would fetch at a fair and bonâ fide sale. The jury were directed to consider whether the sale was fair and bonâ fide, and they found that it was.

(a) 9 B. & C. 696; 4 M. & R. 533.

(b) 6 C. & P. 712.

As the goods were disposed of in the same way as the assignees would have sold them, there can be no ground for this motion.

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GURNEY, B.—I am of the same opinion. As the plaintiffs, when they were before the Judge, made no objection to the mode of selling the property, they have no ground for complaining that the amount, realised by the sale, has been taken by the jury as the fair value of the goods.

ROLFE, B. concurred.

POLLOCK, C. B.—This discussion has been created by the uncertainty of the meaning of the word “value.” To a person who wishes to have the use of goods, it is evident that their value must be greater, than to a person who wishes to dispose of them. The assignees of a bankrupt must part with the property, therefore its value is what it will fetch at a fair and bonâ fide sale. In this case, there is the additional fact, that the assignees permitted the order for the sale to be made, without calling the Judge’s attention to the circumstances, that it might be attended with loss; though I do not decide on that ground. The Courts have adopted this maxim, that where there is a reasonable and proper sale, it is a fair criterion of the value of the goods to the assignees.

Rule refused.

HOPKINS v. FREEMAN.

IN this case, the defendant having been sued for a debt under 20*l.*, consented to a Judge’s order for payment of debt and costs by instalments, and in default of payment debt and costs, and, in default, the plaintiff to be at liberty to sign judgment. Some instalments were paid; but the defendant having afterwards made default, the plaintiff signed judgment for the sum due and costs (which exceeded 20*l.*) and brought an action on the judgment: *Held*, that the Court had no power to interfere, under the 7 & 8 Vict. c. 96.

A defendant
 sued for a debt
 under 20*l.*,
 consented to a
 Judge’s order
 for payment of

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of any instalment, the plaintiff was to be at liberty to sign judgment for the whole. Some of the instalments were paid, but the defendant having subsequently made default, the plaintiff entered up judgment for the amount then due, and costs, (which exceeded 20*l.*.) and brought an action on the judgment.

Pearson moved for a rule, calling on the plaintiff to shew cause why all further proceedings in the action should not be stayed. The 57th section of the 7 & 8 Vict. c. 96, enacts, that after the passing of that act, no person shall be taken in execution upon any judgment "in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment." This is an attempt to evade the provisions of that statute; for it is evident that the object of the plaintiff is to take the defendant in execution. An action on a judgment has always been considered an oppressive proceeding. In *Williams v. Thacker* (a), proceedings on a bail bond were set aside, because the bond was given in a second action for the same cause, although the first action had been non-prossed: the Court there said, that "a second action for the same cause, must always be deemed vexatious, unless the contrary be shewn."

POLLOCK, C. B.—We cannot deprive the plaintiff of his right of action. You must wait until he takes the defendant in execution; although I do not say that, even then, he will be entitled to relief. The recent act of Parliament has no words to meet this case.

Rule refused (b).

- (a) 1 B. & B. 514; See S. C. Pleas refused a similar application
4 Moore, 294. in the following Term, in the case
(b) The Court of Common of *Joseph v. Buxton*.

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ANSLOW v. COOPER.

LSTONE moved for judgment as in case of a upon an affidavit which stated, "that issue was on the 12th of December, 1843, and that the had not yet proceeded to trial." It did not appear the cause were a town or a country cause; and it seem, from the observations in the Court of Common n *Withers v. Spooner* (a), that the affidavit should, in s, state where the venue was laid.

An affidavit in support of a rule for judgment as in case of a nonsuit, need not state whether the cause is a town or country cause; if it appear that issue were joined at such a period, that in neither case the motion would be premature.

ERSON, B.—In either case the defendant would be to move. It is, therefore, unnecessary to state r this be a town or a country cause, as the Court ke judicial notice that the application is not ire.

CURIAM.

Rule nisi (b).

Dowl. 884, N. S.; See (b) The rule was afterwards
Scott, N. R. 164; 5 M. made absolute.
i.

JOYNES v. COLLINSON.

PLE had obtained a rule, calling on the plaintiff to use why he should not give security for costs. The s obtained on the affidavit of the defendant, which "that he has been informed, and verily believes, e residence of the plaintiff is at Glasgow, in the m of Scotland; and that he now, as this deponent en informed, and verily believes, resides there, out urisdiction of this Court."

An affidavit in support of a rule for security for costs, stating that the plaintiff resides out of the jurisdiction of the Court, as this deponent is informed and believes, is insufficient: and such application being

d on account of a defective affidavit, cannot afterwards be renewed upon an amended

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of any instalment, the plaintiff was to be at liberty to sign judgment for the whole. Some of the instalments were paid, but the defendant having subsequently made default, the plaintiff entered up judgment for the amount then due, and costs, (which exceeded 20*L.*, and brought an action on the judgment.

Pearson moved for a rule, calling on the plaintiff to shew cause why all further proceedings in the action should not be stayed. The 57th section of the 7 & 8 Vict. c. 96, enacts, that after the passing of that act, no person shall be taken in execution upon any judgment "in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20*L.*, exclusive of the costs recovered by such judgment." This is an attempt to evade the provisions of that statute; for it is evident that the object of the plaintiff is to take the defendant in execution. An action on a judgment has always been considered an oppressive proceeding. In *Williams v. Thacker* (a), proceedings on a bail bond were set aside, because the bond was given in a second action for the same cause, although the first action had been non-prossed: the Court there said, that "a second action for the same cause, must always be deemed vexatious, unless the contrary be shewn."

POLLOCK, C. B.—We cannot deprive the plaintiff of his right of action. You must wait until he takes the defendant in execution; although I do not say that, even then, he will be entitled to relief. The recent act of Parliament has no words to meet this case.

Rule refused (b).

(a) 1 B. & B. 514; See S. C. 4 Moore, 294.

(b) The Court of Common

Pleas refused a similar application in the following Term, in the case of *Joseph v. Buxton*.



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ANSLOW v. COOPER.

HURLSTONE moved for judgment as in case of a nonsuit, upon an affidavit which stated, "that issue was joined on the 12th of December, 1843, and that the plaintiff had not yet proceeded to trial." It did not appear whether the cause were a town or a country cause; and it would seem, from the observations in the Court of Common Pleas, in *Withers v. Spooner* (a), that the affidavit should, in all cases, state where the venue was laid.

An affidavit in support of a rule for judgment as in case of a nonsuit, need not state whether the cause is a town or country cause; if it appear that issue were joined at such a period, that in neither case the motion would be premature.

ALDERSON, B.—In either case the defendant would be entitled to move. It is, therefore, unnecessary to state whether this be a town or a country cause, as the Court will take judicial notice that the application is not premature.

PER CURIAM.

Rule nisi (b).

(a) 2 Dowl. 884, N. S.; See S. C. 6 Scott, N. R. 164; 5 M. & G. 268. (b) The rule was afterwards made absolute.

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TEMPLE had obtained a rule, calling on the plaintiff to shew cause why he should not give security for costs. The rule was obtained on the affidavit of the defendant, which stated, "that he has been informed, and verily believes, that the residence of the plaintiff is at Glasgow, in the kingdom of Scotland; and that he now, as this deponent has been informed, and verily believes, resides there, out of the jurisdiction of this Court."

An affidavit in support of a rule for security for costs, stating that the plaintiff resides out of the jurisdiction of the Court, as this deponent is informed and believes, is insufficient: and such application being

discharged on account of a defective affidavit, cannot afterwards be renewed upon an amended affidavit.

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Pashley shewed cause. The affidavit is insufficient. In *Archbold's Practice* (a), it is said, "that when the affidavit proceeds upon the information and belief of the deponent, it should shew from what source his information is derived, and upon what his belief is founded." It is no answer to a rule for judgment as in case of a nonsuit, that the plaintiff "has been informed, and believes," that the defendant is in insolvent circumstances, *Symes v. Amor* (b), *Mann v. Williamson* (c). And *Sandys v. Hohler* (d), expressly decides, that, in order to obtain a rule for security for costs, it must be positively stated that the plaintiff is resident out of the jurisdiction, and "belief" to that effect is insufficient. This affidavit would be satisfied by the fact of the defendant having told a third person to come and inform him that the plaintiff resided abroad.

Temple, in support of the rule. Where a deponent speaks to a fact, which must necessarily be more in the knowledge of the other party, it is sufficient to depose upon his "information and belief."

PARKE, B.—According to the books of practice, that is not enough. There can be no difficulty in making a positive affidavit; for the defendant has only to take out a summons, to be furnished with the plaintiff's residence.

Rule discharged, with costs.

The defendant, having subsequently delivered pleas, obtained an order from a Judge at Chambers, requiring the plaintiff to give security for costs. Whereupon,

Pashley obtained a rule to rescind the order, with costs,

(a) p. 1018, 7th ed.

(c) 8 Dowl. 859; S. C. 7 M.

(b) 8 Dowl. 773; S. C. 6 M. & W. 145.

& W. 814.

(d) 6 Dowl. 274.

on the ground, that the motion having been once made, and refused, the defendant had no right to bring it forward again.

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Temple shewed cause; and contended that the application was not the same, being on an amended affidavit.

PARKE, B.—The rule has been already disposed of on the ground of the defect in the affidavit, and the Court ought not again to entertain the motion. If the Court ought not to do so, much less ought a Judge at Chambers. There is a Rule of the Court of King's Bench, Hilary Term, 3 Jac. 1, which orders, “that if any case shall first be moved in Court, in the presence of the counsel of both parties, and the Court shall then thereupon order between those parties; if the same cause shall again be moved, contrary to that rule so given by the Court, then an attachment shall go against him who shall procure that motion to be made, contrary to the Rule of the Court so first made: and that the counsel who so moves, having notice of the said former Rule, shall not be heard here in Court in any cause in that Term in which that cause shall be so moved, contrary to the Rule of Court in form aforesaid.”

Rule absolute (a).

(a) *Tidd's Prac.* 506, 9th ed. *tern Railway Company, ante*, Vol. 1, *Cooper v. Jagger*, 1 Chit. Rep. 445. p. 874. See also *Withers v. Phillips v. Weyman*, 2 Chit. Rep. *Spooner, ante*, Vol. 1, p. 17; S. C. 265. In re *Hellyer v. Snook, Ibid.*; 6 Scott. N. R. 692; 5 M. & G. and *The Queen v. The Great Wes-* 721.

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NICHOLAS PERRY and SUSANNAH, his Wife, v. RICHARD MITCHELL, Administrator of JOHN MITCHELL (a).

In an action on an award, the declaration stated the award to be made "of and concerning the premises"

The plea set out the submission and award in terms. The submission recited, that the parties thereto were relatives, and entitled to a distributive share of the effects of M., who died intestate; that the estate of M. consisted of *debts*, farm stock, cattle, corn, implements of husbandry, household goods, furniture, and other effects; that differences of opinion had arisen as to the value of the farm stock, cattle, &c., (not naming the debts); and that it was agreed to refer all disputes

between the parties to arbitration. The award, which

was made "touching and concerning the matters in difference," found that the defendant, who was the administrator of M., had moneys, farm stock, cattle, corn, &c. of M., to the value of 926*l.*, (but did not mention the effects.) It awarded that the defendant should retain a certain sum, for the purpose of paying the rent and taxes of certain tenements in the occupation of M. at the time of his decease; and that the defendant should pay to the several parties their respective distributive shares of the residue of the estate of M. On special demurrer to the plea, it was objected to the award that it was bad, on the grounds, first, that the arbitrator had omitted to find the value of the "effects," or of the tenements mentioned; secondly, that it did not state the amount of the debts; and, thirdly, that it did not find the amount of the distributive shares.

Held, that upon these pleadings, as the award was expressly made "of and concerning the premises," the Court would intend that the arbitrator had adjudicated upon all matters referred to him; and that, if he had not done so, the omission should have been shewn by plea.

DEBT. The declaration, in substance, stated, that the plaintiff, Susannah, was one of the next of kin of John Mitchell, deceased, who died intestate, and that the plaintiff, Nicholas, was entitled to a portion of the effects of the said John Mitchell, in right of his wife; that differences and disputes had arisen between the plaintiffs, and divers other persons, and the defendant, as to the amount and value of the estate and effects of the said John Mitchell, which had come to the hands of the defendant as administrator thereof; and that in order to prevent litigation, the plaintiffs, defendant, and certain other persons, by a certain agreement in writing, made between the defendant, therein described as one of the next of kin, and administrator of the goods, &c., of John Mitchell, deceased, of the first part, Nicholas Perry, and Susannah, his wife, of the second part, J. Glanville, of the third part, and T. R., J. B., &c., of the fourth part, mutually agreed, that every claim, demand, controversy, question, difference, and dispute, which had arisen, or should thereafter arise, between the several parties thereto, respectively, touching or concerning, amongst other things, the matters and things in relation to their said several shares, claims, or demands, in, to, upon, or out of the estate and effects of the said John Mitchell, deceased, should be paid, settled, and adjusted in every respect,

(a) This case was decided in Hilary Term, but has been hitherto unavoidably postponed.

according to the award of G. L. and J. P. The declaration then alleged, that the arbitrators made their award *of and concerning the premises* so referred to them, and thereby awarded that the plaintiff, Nicholas, was indebted to John Mitchell, at the time of his death, in the sum of 15*l.*; and further found and awarded, that the defendant, as such administrator, at the day of the date of the said agreement, had moneys, farm stock, cattle, corn, corn in the ground, implements of husbandry, household goods, and furniture, which were of John Mitchell, at the time of his death, in his hands to be administered, to the value of 929*l.* 6*s.* 9*d.*, independently of any debt or debts which might have been due and owing to John Mitchell; and that the arbitrators further awarded, that the defendant, as such administrator, should be entitled to set off the said sum of 15*l.*, against the distributive share of the effects of John Mitchell, to which the plaintiff Nicholas was entitled in right of his wife; and that they further awarded, that the defendant should pay to the plaintiffs, and the said other persons, their distributive shares, and that upon payment, the parties should give the defendant a general release. The declaration then averred, that the distributive share to which the plaintiff, Nicholas, was entitled in right of his wife, amounted to the sum of 100*l.*; and assigned as a breach, the nonpayment of that sum.

The plea set out the submission and award in hæc verba, and concluded with a verification. The submission recited, (amongst other things,) that some of the parties were brothers and sisters, and others were nephews and nieces of the deceased; that the estate and effects of the deceased consisted of "debts due and owing to him at the time of his death, farm stock, cattle, corn, corn in the ground, implements of husbandry, household goods and furniture, and other effects;" and that differences of opinion had arisen between the defendant, and the several parties thereto of the fourth part, as to the value of the said farm stock, cattle, corn, &c., which had come to the hands of the defendant, as adminis-

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trator; and that the parties of the second, third, and fourth parts, had mutually agreed to submit all matters in dispute, in any matter relating to the premises, to arbitration. It then witnessed, that the defendant, and the other parties, agreed with each other, "that no proceedings at law or in equity should be commenced or prosecuted, but that all and every claim, demand, controversy, question, difference, and dispute, which had arisen, or should thereafter arise, between the several parties thereto respectively, touching or concerning the matter and things thereinbefore mentioned, or in relation thereto," should be paid, settled, and adjusted, according to the arbitrament of two arbitrators, named, &c. The award was stated to be made, "touching and concerning the matters in difference, and to the arbitrators referred as aforesaid," and recited the submission, and after awarding respecting certain debts, and that the plaintiff, Nicholas, was indebted to the deceased in the sum of 15*L.*, proceeded thus:—"And we do find, award, and determine, that the said Richard Mitchell, as such administrator to the estate and effects of the said John Mitchell, deceased, at the day of the date of the said recited agreement, had moneys, farm stock, cattle, corn, corn in the ground, implements of husbandry, household goods and furniture, which were of the said J. Mitchell, at the time of his death, in his hands, to be administered to the value of 929*L.* 6*s.* 9*d.*, independently of any debt or debts which might have been due and owing to the said J. Mitchell, from any person or persons whomsoever; and we do order, award, and determine, that the said Richard Mitchell shall be entitled to retain out of the said assets now in his hands, the said sum of 140*L.*, which we find to be owing to him as aforesaid; and also the sum of 65*L.*, for the purpose of paying and discharging the rent, rates, tithes, and taxes of all those tenements, called Mitchell's, &c., which were in the occupation of the said John Mitchell, at the time of his decease; and we do award, order, and determine, that the said Richard Mitchell, as such adminis-

trator as aforesaid, shall be entitled to set off the sum of 15*l.*, which we find to be owing from Nicholas Perry, against the distributive share to which he is entitled in right of his wife, to the effects of J. Mitchell; and we do further order, award, and determine, that the said Richard Mitchell shall and do, on the 3rd day of December next, pay to the said Nicholas Perry, and Susannah, his wife, J. Glanville, &c.,” (naming the several parties,) “ their several and respective distributive shares of the clear residue of the personal estate and effects of the said John Mitchell, deceased, first retaining unto himself, the said Richard Mitchell, his own distributive share of the said clear residue of the personal estate and effects of the said John Mitchell, deceased, left, after full payment of all the just and lawful debts of the said John Mitchell, deceased, and of the several sums hereby ordered by us to be paid.”

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Special demurrer, assigning for cause, that the plea neither confesses and avoids, nor denies the matters alleged in the declaration.

Hugh Hill, in support of the demurrer. First, the plea is bad. If the defendant means to contend that the award is bad, the plea should have traversed the fact of the making and publishing the award, *Gisborne v. Hart* (a). The case resembles *Muntz v. Foster* (b), where, in an action for the infringement of a patent, the declaration set out the usual proviso in the letters patent, that they should be void, unless the plaintiff, within six months, enrolled a sufficient specification; and then averred that the plaintiff did, in pursuance of the proviso, by an instrument in writing, particularly describe the nature of his invention, and did, within six months, cause the said instrument in writing to be enrolled. The plea recited the proviso contained in the letters patent, and averred that the plaintiffs caused to be enrolled, within six months, a certain instru-

(a) 5 M. & W. 50; See S. C. 7 Dowl. 402.

(b) *Ante*, Vol. 1, p. 737; See S. C. 7 Scott, N. R. 471.

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ment in writing, in words and to the effect following, (setting out the specification); and that the plaintiff caused to be enrolled no instrument in writing other than and except the said instrument thereinbefore set forth; whereby the letters patent became void: and it was held, that the plea was bad, as an argumentative denial of the enrolment of the specification alleged in the declaration. To render the present plea good, it should have concluded with a special traverse. Secondly, the declaration and award are good. The award which recites the submission, purports to be made "of and concerning the premises," and it appears from the submission, that the subject-matter of dispute was "the value of the farm stock, cattle, corn, corn in the ground, implements of husbandry, household goods and furniture, and other effects, of John Mitchell, which had come to the hands of the defendant, as administrator." The arbitrator finds the amount of such farm stock, &c., and awards that the defendant, at a certain time and place, shall pay the distributive shares to the parties entitled. Where the submission was of all matters in difference, an award of so much to be paid by the defendant to the plaintiffs, on their banking account, and for which sum the plaintiffs were to give the defendant a release, has been held good, *Ingram v. Milnes* (a). [*Parke*, B.—Should not the award have directed how much is to be distributed to each of the respective parties.] The Statute of Distributions will point out the share which each is to take. [*Parke*, B.—In order to warrant the direction for payment of the distributive shares, they must fall within the general description "of all matters in difference relating to the premises."] If the award be certain on the face of it, uncertainty will not be assumed, *Cargey v. Aitcheson* (b). It does not appear that there was any dispute as to the amount of the distributive shares, and if there were, that fact should have been shewn by plea. [*Alderson*, B.—In

(a) 8 East, 445.

& R. 433; In error, 2 Bing. 199;

(b) 2 B. & C 170; S. C. 3 D. S. C. 9 Moore, 381.

Cargey v. Aitcheson, there was an award of a given sum: I agree that in such case there is every intendment that such sum is to be paid.] Where there was a submission concerning all controversies relating to a certain voyage, and the award directed that one party should pay his share of the expenses of the voyage, and allow, on account, his proportion of the loss which should happen to the ship during the voyage, such award was held good, for these expenses and losses might be reduced to a certainty. *Roll. Abr. tit. "Arbitrement,"* (H) 14. [*Alderson*, B. — Could an action be maintained on that award?] If the declaration alleged that the total amount of the loss was so much, and the total amount of the expenses so much, that would be good, unless it were shewn by plea that there were controversies as to those matters. In *Wohlenberg v. Sageman (a)*, an award, that two persons should pay a debt in proportion to the shares which they held in a certain ship, the ratio of their shares not being a subject of dispute, was held sufficiently certain.

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Dickenson, contra. This case is distinguishable from that cited from *Rolle's Abridgment*; for there the disputes were between plaintiff and defendant only; here the interests of various other parties are involved. This award is uncertain on the face of it; for it appears, by the recital, that there were "other effects," the value of which has not been determined by the arbitrator. The term, "other effects," must mean effects ejusdem generis, *Clark v. Gaslarth (b)*; therefore, the arbitrator has not found the value of all the personal estate and effects which have come to the hands of the defendant. It also appears, by the award, that there were leasehold tenements, respecting which he has not adjudicated. Another objection to the award is, that it appears that certain debts were owing to the deceased, but the arbitrator has omitted to find their amount. The award is also bad, on the ground that it does not state

(a) 6 Taunt. 254; S. C. 1 Marsh. 579.

(b) 8 Taunt. 431; S. C. 2 Moore, 491.

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the amount of the distributive shares of each of the next of kin. The cause of action arises upon an award in respect of a difference as to the distributive shares, and such matter has not been determined by the arbitrator.

Hugh Hill replied.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B.—The question in this case arose upon a special demurrer to a plea. The declaration was in *assumpsit* on an award, by which the defendant, the administrator of one J. Mitchell, deceased, was ordered to pay, at a certain time, to the plaintiffs, N. Perry, and wife, the wife's share, under the Statute of Distributions; and the breach assigned was the nonpayment of that share. The plea stated the submission and the award fully, and was demurred to specially, on the ground that it neither denied nor confessed the allegations in the declaration. Mr. *Hill*, however, in the course of his argument for the plaintiff, waived that objection; and the question to be decided by the Court is, whether, comparing the award and the submission, as set out in the plea, the award is bad. [His Lordship then stated the submission and award.]

The objections made to the award, were, that it was not final: First, because it did not ascertain the value of *all* the estate come to the defendant's hands at the date of the agreement; for it omitted any valuation of *the effects*, or of the farms, which it was said the deceased held at the time of his death, the outgoings of which the defendant was to pay: Secondly, because the award did not state how much the debts amounted to: And thirdly, because it did not state how much was the plaintiffs' distributive share. Upon the first view of this award, some of the objections, particularly the last, seemed to be entitled to great weight; but, upon consideration, we think that none of them can be supported upon the present pleadings. This award is

expressly made, *of and concerning the premises* submitted to the arbitrators. The rule on this subject is distinctly laid down in the second resolution in *Baspole's case* (a), and is this: "That where it appears, by the award, that it was made *de præmissis*, these words imply that the arbitrator has made an arbitrament of all that has been referred to him, and so it shall be intended, until the contrary be shewn and alleged by the other party." This rule has always been followed, and was acted upon in the case of *Cargey v Aitcheson* (b), which was relied upon by the plaintiff's counsel, on the argument of the case. The application of this rule, in the present instance, answers all the objections. First, the arbitrators have ascertained the value of the farm stock, cattle, corn in the ground, &c., and also the *moneys* received by the defendant at the date of the agreement; and we cannot intend that there were any other "*effects*," besides the farm stock, and other enumerated articles. As to the objection that the intestate had a farm, because the outgoings of it are ordered to be paid by the defendant; the answer is, that it does not appear that he had any *term*, or *estate* in the land, in his occupation, which could be valued; but that he occupied merely. Secondly, it must be intended that there was no difference as to the amount of the debts; because it is not recited in the agreement, nor stated in the pleading, that there was any. Thirdly, it is in like manner not to be intended that there was any dispute as to the amount of the distributive share of N. Perry, in right of his wife; nor of any of the other parties of the fourth part. It is not to be supposed, that their degree of relationship, and, consequently, aliquot parts of the intestate's estate, were not previously ascertained; nor that the amount of the debts due from the intestate, as well as of those due to him, was not undisputed; and we must assume that the only question submitted, (besides those specially described), was, whether the defendant was then, or at any certain time, bound to pay to the plaintiffs, and the other claimants, their ad-

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(a) 8 Rep. 98, a.

(b) 2 B. & C. 170.

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mitted portions of the sum found by the award to be in the hands of the defendant, after paying the undisputed debts of the intestate, and those found to be due to the particular creditors named in the award. Upon this supposition, the award gives a cause of action to the Perrys; and if the supposition be incorrect, and the amount of the Perrys' share, or any other matter supposed to be admitted, were really in dispute, the defendant should have shewn that by plea, and the award would in that case have been bad. But, in the absence of a plea that other matters were in difference than those which are adjudicated upon, we think the award good.

Judgment for Plaintiff.

SMITH *qui tam* v. BOND (a).

Wherever force or fraud is used for the purpose of perverting the course of justice, either by the parties, or by a stranger to the suit, they are liable to be attached for a contempt of Court.

A Judge at Chambers having ordered the plaintiff's attorney to deliver particulars under the 2 Wm. 4, c. 39, s. 17, the plaintiff furnished his attorney with a false account: *Semble*, that the plaintiff was liable to be attached; though the Judge's order had not been made a rule of Court.

THIS was a rule, calling on the plaintiff to shew cause why an attachment should not issue against him. The action was brought on the 9 Ann., c. 14, s. 2, to recover money won at play; and at the trial, a verdict passed for the plaintiff for 1000*l*. A Judge's order had been obtained under the 2 Wm. 4, c. 39, s. 17, directing the plaintiff's attorney to deliver to the defendant's attorney, an account in writing of the particulars of the place of residence, and occupation of the plaintiff. Particulars were accordingly delivered, but which were afterwards discovered to contain an untrue account. It appeared from the affidavits, that the particulars were furnished by the plaintiff to his attorney; and that the latter, at the time he delivered them, had no knowledge that they were untrue.

Lush shewed cause. The plaintiff is not liable to an attachment: first, he is not the party enjoined by the order to deliver the particulars; and secondly, an attachment does not lie for disobedience of a Judge's order, unless it

(a) See this case, *ante*, Vol. 1, p. 287; S. C. 11 M. & W. 326.

has been made a rule of Court. The order was made under the 17th section of the 2 Wm. 4, c. 39, and as it was never served on the plaintiff, he was under no obligation to obey it, for the statute only applies to the attorney (a). There is no instance of a contempt, created by disobedience of a Judge's order, unless the order has been made a rule of Court. [*Pollock*, C. B.—The jurisdiction of the Masters in Chancery is enforced by making a contempt towards them, a contempt of the Great Seal. It is not to be too hastily concluded, that the Court will not interfere, if the plaintiff adopted this course with the view of evading the Judge's order. Where a Judge's order is made under the authority of an act of Parliament, it is an instrument which requires obedience; and if there were any intention on the part of the plaintiff to impose upon the Court, it appears to me that the order need not be made a rule of Court.] This is not such a contempt on the part of the plaintiff, as the Courts have been accustomed to punish by attachment. [*Alderson*, B.—There are many cases of Judge's orders, made under authority of acts of Parliament, where the Court has no jurisdiction; for instance, an order for the attachment of stock; can it be said, that in such case the Court could not issue an attachment for disobedience of the order?] The meaning of a "contempt" of Court was

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(a) It enacts, "That every attorney whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the Court or any Judge of the same, or of any other Court shall so order and direct, declare in writing, within a time to be allowed by such Court or Judge, the profession, occupation, or quality,

and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said Court, or any Judge of either of the said Courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance."

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fully considered in the case of *Miller v. Knox* (a), where all the authorities bearing on the subject are collected. The misconduct of the plaintiff does not arise from any disobedience of the order of the Court, he is only guilty of a mere nonfeazance. [*Pollock*, C. B.—It is something more than a nonfeazance; it is the doing what he ought not to have done, namely, giving to his attorney a false account of his residence. Suppose he had stated as his residence, some absurd, impossible place, would he not be liable for a contempt? Suppose a party represented himself as the defendant in an action, in order that the sheriff might take him, and the real defendant escape?] The Court has no jurisdiction over a party not named in the order. Where a rule in ejectment required possession of certain premises to be delivered up, but did not mention by whom, the Court refused to issue an attachment against the tenant in possession, because he was not named in the rule; *Doe dem. Lewis v. Ellis* (b). In *The King v. Faulkner* (c), Lord Abinger, C. B., in delivering judgment, says, “the Judges of the different Courts, whilst discharging their judicial functions, which they have discharged from very ancient times, separately, and in Chambers, as ancillary to the general business of the Court, have never yet ventured to act as Courts of Record, although they are Judges of Courts of Record; they do not, when they act individually, even when they are discharging part of their judicial functions, assume to themselves the powers of a Court of Record; which is illustrated by the instance referred to, that an order of the Judge at Chambers cannot be enforced by attachment, but must first be made a rule of Court, before there is any contempt in violating it. That is a strong instance to shew that a man may be acting as a Judge of Record, and discharging his judicial functions, without possessing the power of committing for a contempt.” In *Baker v. Rye* (d), it was expressly decided, that an

(a) 4 Bing. N. C. 574 ; S. C.

(c) 2 C., M. & R. 533.

6 Scott, 1.

(d) 1 Dowl. 689.

(b) 9 Dowl. 944.

attachment will not lie for disobedience of a Judge's order, until it has been made a rule of Court. [*Parke, B.*—Suppose the case of a person, who, knowing that he is about to be served with a rule, snatches the rule from the party about to serve it, and tears it to pieces, would not that be a contempt of Court?] There is an affidavit that the plaintiff had apartments at the place mentioned, and also that his letters were addressed there, though he did not live there.

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Platt and *Butt*, in support of the rule. It is submitted, that if several persons conspire together to do an act which amounts to a contempt of Court, they may all be attached. And if a person, knowing that a sheriff's officer is about to arrest a debtor, contrives to carry him away, that would also, it is presumed, be held a contempt. There can be no difference in principle, whether force or misrepresentation be used, the object being to defeat the process of the Court. Proceedings in Court will stand in *pari passu* with a rule of Court. If an attorney were about to serve a rule on R., and a stranger come and take it away, in order to prevent the service, the Court would, no doubt, hold him liable to an attachment. It is the same if the service were defeated by misrepresentation. The act of Parliament makes the disobedience of the Judge's order by the attorney, a contempt of Court, and, therefore, renders liable every person who contributes to the unlawful act. It is not a mere act of omission; disobedience of an order for the payment of money is punished by attachment; a fortiori, where the disobedience occasions an obstruction of justice. [*Alderson, B.*—Suppose an unstamped agreement, which a party was ordered to bring into Court for the purpose of being stamped, and a stranger burnt it?] The several instances of contempt are enumerated in *Arch. Prac.*, p. 1262, 7th ed.

POLLOCK, C. B.—We must see, first, whether the Court has power to grant an attachment; and secondly, whether

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the case is one dignus vindice. This is a motion for an attachment for causing to be delivered an untrue account of the residence of the plaintiff. Had that been done by the attorney of the plaintiff, with the same knowledge and the same object with which the plaintiff is alleged to have acted, there could have been no doubt about the authority of the Court. But it has been urged, in argument, that this is not a contempt which the Court will visit in the person of the plaintiff; because he is not named in the act of Parliament, which makes the attorney only, liable for the contempt. I am by no means prepared to assent to that view of the case. Without deciding, on the present occasion, that this is a case within the authority of the Court, I am very strongly inclined to think, that, in almost every instance, parties are guilty of a contempt, who in any way obstruct, pervert, or defeat the authority of the Court. It is unnecessary, however, to pronounce any decision as to whether this particular case be within the scope of the act of Parliament; because, on looking at all the circumstances, it does not appear to me to be a case, in which the Court are called upon to issue an attachment. Taking into consideration all the circumstances of the case, I think the object, which the Court ought to have in view, will be answered, by giving an expression of my opinion, that wherever either force or fraud is used, for the purpose of perverting the cause of justice, especially by those who, as suitors, are before the Court, and therefore peculiarly amenable to its jurisdiction, the parties are liable to an attachment. It is sufficient, in the present case, to discharge the rule, on payment of costs. There is no doubt the plaintiff has extremely misconducted himself, and ought, therefore, to pay the costs of this application; but they may be set-off against the judgment.

PARKE, B., and ALDERSON, B., concurred.

Rule accordingly (a).

(a) Decided in Hilary Term, 1845.

COURT OF QUEEN'S BENCH.

Michaelmas Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

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THE following order of reference in the above cause, was made at the Summer Assizes, 1843, by Mr. J. Coleridge :

"Upon hearing the attorneys on both sides, and for William Cole, and by their consent, I do order, that a verdict be entered for the plaintiff, damages 50*L.*, subject to the award of the arbitrator hereinafter named, who shall be at liberty to order and direct, for whom, and for what sum, the verdict shall be finally settled; and that it be referred to the award, order, arbitrament, final end, and determination of, &c., to settle all matters and differences between the said parties to this action, and between the said defendants and William Cole, and to order and determine what he shall think fit to be done by either party, respecting the matters in dispute, who agree to be bound and concluded by such determination," &c : "the costs of the said cause to abide the event of the said cause,

The Court in general requires the same formalities to be observed as to personal service, where the application is with a view to issue execution under an award, by virtue of 1 & 2 Vict. c. 110, s. 18, as in cases of attachment.

Where, however, it clearly appeared from the admission of the party, that he was aware of the award and its contents, the Court, under special circumstances,

granted a rule, calling on him to shew cause why he should not pay the sum awarded, &c.

By an order of reference to which one W. C. became a party, the above cause was referred to an arbitrator to settle the amount of the verdict, and "all matters in difference between the parties to the action, and between the defendants and W. C.;" the costs of the cause to abide the event, and all other costs to be in the discretion of the arbitrator. The arbitrator treated W. C. as a party to the action, by awarding 40*s.* damages to be paid by the defendants to the plaintiff, S. H., and to W. C. : and that the defendants should pay the costs of the reference and award. There was one entire taxation of the whole costs. The Court discharged a rule calling on the defendants to pay the amount so awarded, and the costs as taxed; leaving the parties to their remedy by action.

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and all other costs to be in the discretion of the arbitrator," &c.

On the 22nd of February, 1844, the arbitrator made his award, which, after reciting the order of reference, proceeded as follows: "Now I, the said, &c., the arbitrator aforesaid, having taken upon myself the burden of the said arbitrament, and having heard the allegations and proofs of both the said parties, concerning the said premises, do thereupon make this my award in writing, concerning the same, in manner following; that is to say, I do award, adjudge, and determine, that all further proceedings in the said cause, shall from henceforth cease, and be no further prosecuted; and that the said plaintiff had good cause of action against the said defendants in the said cause, and was and is entitled to a verdict therein; and I assess and award the damages to be paid by the said defendants to the said plaintiff, S. Hawkins, and W. Cole, who consented to become a party in the cause, at the sum of 40*s.*; and I do further direct and award, that the costs of this reference and award be paid by the said defendants," &c.

In pursuance of this award, there had accordingly been one entire taxation of the costs of the reference and award, and of the cause.

Best now applied for a rule, (under the 1 & 2 Vict. c. 110, s. 18,) calling on the defendant, Benton, to shew cause why he should not pay to S. Hawkins and William Cole, or their attorney, the damages of 40*s.*, together with the costs, which had been taxed at 17*5*l. 5*s.* The difficulty in this case is, that there has been no personal service on Benton, of a copy of the award and allocatur, which the Master, on the authority of the case of *Pearson v. Archbold* (a), seemed to think equally necessary, as in the case

(a) 11 M. & W. 108; S. C. 2 Dowl. 769, N. S. It would seem, from the reports of this case, that the objection was not

so much that there was no *personal* service of the award, as that there was no *service* at all.

of an attachment. That case is, however, distinguishable from the present; for here a letter, which is set out in the affidavit, had been written to the defendant, Benton, on the 28th of August, 1844, informing him that the costs of the action, reference, and award, had been taxed at 177*l.* 5*s.*, for which the Master's allocatur had been given, and that, with the sum of 40*s.*, damages, awarded by the arbitrator, the whole amount due was 179*l.* 5*s.*, that the order of reference had been made a rule of Court, with a view of issuing execution against him, and that he must immediately pay the amount, to prevent further expenses. To this letter, an answer had been received from Benton, on the 30th of the same month, acknowledging the receipt of the letter, and saying, that he would send a friend to arrange the business, and that it would "indeed be unnecessary to incur further expense." The affidavits then shew, that negotiations have taken place between the parties; and that efforts have been made to effect a personal service, by calling on Benton, who is a solicitor at Birmingham, both at his office and private house, without success; that on the last occasion, Benton's brother was seen, and the purpose of the visit told him, who had thereupon represented himself to be acting as clerk to his brother, and offered to give a copy of the award, rule of Court, and allocatur, to his brother, which documents were, accordingly, left with him, the originals, at the same time, being shewn to him. It also appeared, that the London agent of Benton had applied for a copy of the award, which the arbitrator had accordingly sent to Benton at his address at Birmingham. In the case of *Pearson v. Archbold* (a), it does not appear that the defendant had had any notice of the award or allocatur at all; and, therefore, without service, he could not know what he had to pay. In the present case, the affidavits shew that Benton is aware of the award

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(a) 11 M. & W. 108; S. C. 2 Dowl. 769, N. S.; See *ante*, p. 466, note.

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and its contents; that he knows that the order of reference has been made a rule of Court; that the costs have been taxed, the Master's allocatur given, and for what amount. [*Patteson*, J.—You certainly bring these facts home to the attention of the party. There is, however, a case of *Wilson v. Foster* (a) in which the Court of Common Pleas did not consider it sufficient merely to shew that the party was aware of the contents of the award.] In that case also, it did not appear, that the rule of Court or allocatur were, in any way, brought to the knowledge of the defendant. *Jordan v. Berwick* (b), shews, that where there are special circumstances, which, it is submitted, there are in the present case, the Court will not require personal service of the rule nisi. There is the additional circumstance in this case, that Benton is an attorney. In an unreported case of Michaelmas Term, 1843, Mr. J. *Patteson* is said to have granted a similar rule, where copies of the documents had been left at the residence of the party, who was an attorney, and who afterwards acknowledged the receipt of them.

PATTESON, J.—I find that the Masters of the Courts of Common Pleas and Exchequer, have usually acted upon the rule, that in applications of this kind, the same formalities in service should in general be observed, as in the case of a motion for an attachment; but that under special circumstances, that strictness may be dispensed with. I think the present a case in which a rule may be granted.

Rule nisi (c).

(a) *Ante*, vol. 1, p. 496; S. C. 6 Scott, N. R. 936; 6 M. & G. 149.

(b) 1 Dowl. 271, N. S. See *post*, p. 470, note.

(c) This form of rule was useless, and, therefore, probably unknown before the statute 1 & 2 Vict. c. 110; but soon after the passing

of that act, parties sought to avail themselves of the provisions of sect. 18, enabling them to issue execution on a rule of Court for the payment of money, instead of proceeding by attachment. It was at first suggested, that the Courts had no authority to grant such a rule, *Neale v. Postlethwaite*, 1

The rule was drawn up to shew cause on the 20th of November, but was not served on Benton, who lived at Birmingham, till that day.

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Q. B. 243; S. C. 4 P. & D. 623, particularly in cases where money was payable under an award, *Doe v. Amey*, 8 M. & W. 565; S. C. 1 Dowl. 23, N. S. But the Courts unhesitatingly exercised the power of granting such rules; at the same time refusing to permit parties, except in cases where there was an ascertained sum payable by the rule of Court, to issue execution on the rule of Court, without first coming to the Court and obtaining an express sanction for such proceeding; *Jones v. Williams*, 11 A. & E. 175; S. C. 4 P. & D. 217, and *Jones v. Williams*, 8 M. & W. 349; S. C. 9 Dowl. 702. And in the case of *Neale v. Postlethwaite*, 1 Q. B. 243, they imposed upon the applicant the condition that he should not proceed by attachment. Indeed it was at one time doubted whether a similar restriction should not be engrafted upon every such rule; *Burton v. Mendizabel*, 1 Dowl. 336, N. S.

It is quite clear, therefore, that in the case of an award, the successful party has not a right to enforce payment of money awarded to him, by virtue of any express provision of the statute; but can only do so, by the Court granting him a new form of rule, which enables him to avail himself of the provisions of the statute.

The 18th sect. of that act declares that "all rules of Courts of

common law, whereby any sum of money, or any costs, charges or expenses shall be payable, &c., shall have the effect of judgments;" still leaving it to the discretion of the Court to determine under what circumstances they will grant a rule of Court for the payment of money.

Except the occasional difficulty of effecting personal service, there does not seem to be any reason why the Courts, in extending to the case of awards the benefits of the inexpensive and speedy mode of execution which a proceeding under the 18th section of the 1 & 2 Vict. c. 110, affords, should dispense with a personal service of the award, rule of Court, and allocatur, or with a personal demand, as in cases of attachment. Perhaps, indeed, no injustice would result from dispensing with personal service in cases like the principal one, where a difficulty is experienced in effecting the service; and where there is a clear admission by the party proceeded against, that he has notice of the award and of its contents, and that the agreement, or order of reference on which it is founded, has been made a rule of Court; that the Master's allocatur has been granted, and for what amount; and that he is required to pay the money.

The remedy by action on the award; and, as it would seem, also that by attachment, still remains.

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Best, on the last day of Term, moved to make it absolute. A difficulty had occurred, in consequence of the rule not

As, therefore, an additional and summary method is thus given to a party to enforce his rights, under this act of Parliament, it is not unreasonable, as observed by Lord Abinger, in *Rickards v. Patterson*, 8 M. & W. 313; S. C. 1 Dowl. 52, N. S., that "the same steps should be taken as would have been necessary in a proceeding against his person by attachment; or, at all events, that he should have some distinct notice of the proceedings." And in this Court, in the case of *Jordan v. Berwick*, 1 Dowl. 271, N. S., Mr. J. Patterson also says, that he thinks the service of the rule nisi, (which, as it will be presently shewn, stands on the same principle), should be personal. In the Court of Common Pleas, in the case of *Wilson v. Foster*, 6 M. & G. 149; S. C. ante, vol. 1, p. 496, the Court clearly intimate that they consider a personal service to be necessary. The reports of the case of *Pearson v. Archbold*, 11 M. & W. 108; 2 Dowl. 769, N. S., do not shew that the decision of the Court in that case, turned upon the necessity of a *personal* service.

The only decision which interferes with the general rule thus laid down, is that of *Doe d. Moody v. Squire*, 2 Dowl. 327, N. S. There it was objected, on shewing cause against a rule similar to the above, that the same preliminary proceedings had not been complied with as were requisite in cases of attachment; and Mr. J. Wightman is reported to have said, "I think

enough is done in obtaining this rule, without going through the forms which were necessary in cases of attachment." But in the report of that case it is not anywhere stated what service had there been effected; although his Lordship might probably consider that what had been done was sufficient, on the ground that it had had the effect of bringing the party before the Court to shew cause against the rule. The latter part of the marginal note to *Jordan v. Berwick*, 1 Dowl. 271, N. S., that "on a statement of special circumstances, a less strict service" (of the rule nisi) "may be allowed," is not warranted by the decision in that case. All that was there decided was, that the service of the rule nisi must be personal; and the rest is merely an obiter dictum of the learned Judge, as to what might be a proper subject for the future consideration of the Court, under another and a different state of facts. Besides, in that case it does not appear but that there had been a personal service of the award; at least, the counsel there admits that there were no circumstances in the case "to require any deviation from a special personal service, if the Court should be of opinion such a service was requisite." But, even were it otherwise, the "special circumstances" to which the learned Judge referred as possibly dispensing with the necessity of strictness of service, might probably be such as have now

having been served till the day on which cause was to be shewn, and the officer thought the application premature, on the authority of *Furrell v. Dale* (a). The authority of that case is, however, doubtful.

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PATTERSON, J.—The Court will adhere to the practice as there laid down. You may, however, enlarge your rule.

Rule enlarged.

been acted on, in the principal case.

Some difficulty is felt as to the service of the rule nisi. In the Common Pleas, the practice is understood to be, to draw it up for personal service, as in cases of attachment; and the recent case of *Ansell v. Thomas*, in Hilary Term, 1845, in the Court of Exchequer, shews that that Court also requires personal service of the rule. In this Court, it does not appear that the same strictness has been required.

It is not perhaps essential, except for the sake of uniformity of practice in the Courts, that the rule should be personally served, where the service of the award, &c., has been personal; but the difficulty is, that it is chiefly in those very cases, where there has been an imperfect service of the award, that it is sought to dispense with a personal service of the rule.

If a personal service of the rule nisi, as well as of the award, &c. be held to be indispensable, the service of the latter may possibly operate as a warning, and enable a party who is so disposed, to

avoid the service of the rule. When, therefore, the award, &c. has been personally served, service of the rule at the residence of the party, as in the case of a rule to compute, &c., may probably be sufficient. But to dispense with personal service of both the award and the rule, is in effect to dispense with any personal notice whatever. Under such circumstances a party may submit to a reference, and attend the arbitrator; and yet be entirely ignorant of the making of the award, of the agreement of reference having been made a rule of Court, or of the costs having been taxed and the Master's allocatur given; and his first notice of these facts may be, when a writ of execution issues against him.

According to the recent case of *Arthur v. Marshall*, ante, p. 376, it would seem that the Court of Exchequer are of opinion that the rule ought not to be made returnable before a Judge at Chambers in Vacation. The practice, however, in this Court has been, in particular cases, to allow the rule to be drawn up in that form.

(a) 2 Dowl. 15.

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Afterwards (a),

Gray shewed cause against the rule. (He objected, first, that there had been no personal service of the award, and demand of the money, but afterwards waived the point; and proceeded to argue against the validity of the award.) He submitted, that the award was clearly bad for awarding damages to the plaintiff and Cole jointly; Cole being no party to the cause. The arbitrator has awarded 40*s.* damages to the plaintiff and Cole, and as some part of that sum must have been in respect of damages to Cole, the plaintiff must have recovered less than 40*s.*; and if so, it is not clear, as the cause of action does not appear, that the plaintiff was entitled to the costs of the cause, which the Master has taxed in his favour. The award is also void for uncertainty; for it does not appear in respect of what cause of action the 40*s.* damages are given. The defendant could not plead this award in bar of a second action. The principle in *Hutchinson v. Blackwell* (b), applies. The only authority of the arbitrator here was to deal with the verdict: *Garland v. Noble* (c).

Best, in support of the rule, contended, that the reference was in general terms, and that the arbitrator was not bound to confine himself to the sole question of the amount for which the verdict was to be entered. With respect to Cole, he was made a party to the cause by the order of reference, and the arbitrator could not treat him in any other character. If so, the damages are joint damages of sufficient amount, and the taxation was correct. The Court will not presume, that there were other matters in difference than those on which the arbitrator proceeded.

(a) In Hilary Term, 1845, before Mr. Justice *Williams*. There was no fresh service of the rule; as *Gray* appeared and con-

sented to the rule being enlarged.

(b) 8 Bing. 331; See S. C. 1 Moore & S. 513; 1 Dowl. 267.

(c) 1 Moore, 187.

The cases quoted do not apply, and that of *Garland v. Noble* (a), is rather in favour of the plaintiffs. [*Williams, J.*—Have you any authority to shew, that a stranger coming in as a party to a reference, can be treated as a party to the original cause?] There is no case exactly in point; but on principle, it is submitted, he may be. He cited *Watson on Awards*, p. 3.

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Cur. adv. vult.

WILLIAMS, J. (After shortly stating the facts of the case).—It appears to me, that the arbitrator has not distinctly awarded, as, by the terms of the reference, he was bound to do, between the parties to the action, and between the defendants and William Cole: but has awarded damages, as if Hawkins and Cole were the plaintiffs, instead of Hawkins alone. Now it seems to me extremely doubtful, whether the arbitrator could introduce into the action, a different party than the one in the original suit; and whether, therefore, this award is not a distinct award of damages with respect to Cole. That being so, as the present application is much in the same light as a motion for an attachment for non-performance of the award, I think the case presents sufficient doubt to warrant me in refusing to make this rule absolute; more particularly as there is still another remedy open to the party. The rule will, therefore, be discharged.

Rule discharged.

(a) 1 Moore, 187.

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HOBBS v. YOUNG.

A *qui tam* action of debt for penalties under the 6 & 7 Wm. 4, r. 66, is not within the Reg. Gen., H. T. 2 Wm. 4, r. II.; so as to require an indorsement of the amount of the debt, on the writ of summons and copy thereof.

Quære, where the alleged irregularity is the want of an indorsement, under the Reg. Gen., H. T. 2 Wm. 4, r. II., if the motion should be to set aside the copy of the writ and service.

WORDSWORTH shewed cause against a rule which had been obtained by *Atkinson*, to set aside the copy and service of the writ of summons in the above cause, on the ground that there was no indorsement of the debt thereon, in pursuance of the Reg. Gen., H. T. 2 Wm. 4, r. II., which is extended to writs of summons, &c., by Reg. Gen., M. T. 3 Wm. 4, r. V. This case, it is submitted, does not come within the meaning of this rule. The plaintiff's affidavits shew that this is a *qui tam* action of debt against the proprietor of "The Sun" newspaper, for having, in contravention to the stat. 6 & 7 Wm. 4, c. 66, published an advertisement of a foreign lottery, whereby he had incurred a penalty of 50*l.*, to be paid one-half to the party suing for the same, and the other to her Majesty. The rule referred to, cannot apply to a case like the present, where the sum sought to be recovered is in the nature of a penalty; and part belongs to her Majesty, and part to the plaintiff. The writ of summons, as set out on the affidavit, shews that the plaintiff "sues as well for our royal Majesty," &c. How, then, can the plaintiff's attorney say, how much her Majesty is entitled to, and how much the plaintiff? The case of *Davies v. Lloyd* (a), and the observations of Mr. Baron *Parke*, and Mr. Baron *Alderson*, shew that the rule does not apply to cases where the party sues to recover a penalty. So in actions on replevin bonds, and bail bonds (b), no one ever heard of the plaintiff being required to indorse the sum he seeks to recover on the writ of summons; and it follows, from the very nature of the action, that he could not reasonably be required to do so. [*Patteson*, J., referred to *Perry v. Patchett* (c).] There are

(a) 6 Dowl. 173; See S. C. 3 Dowl. 34.

3 M. & W. 69.

(c) 2 Dowl. 667; See S. C.

(b) See *Rowland v. Da Reyne*, 1 C., M. & R. 87.

2 Dowl. 832, and *Smart v. Lovick*,

also formal objections to this motion. It should have been to set aside the writ, and not the copy and service merely; *Anon.* (a). The affidavit also is defective. It only states that the cause of action "is laid in debt;" whereas it ought to state, that the cause of action "is a debt."

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Atkinson, in support of the rule. The principle of the rule should apply to the present case. Here the penalty is a sum certain, and the defendant should know whether the action is for one or more penalties; so that he may pay the amount, and avoid further expense. There are no further consequences entailed by the act, than the forfeiture of the sum of 50*l.* for each offence; and the present case is therefore distinguishable from that of *Davies v. Lloyd* (b), which was an action for penalties under the Municipal Corporations Act, which also entailed disabilities on a defendant against whom the verdict passed. So that there the defendant might be willing to pay the amount of the penalty, in order to avoid the consequences of the disabilities attendant on a verdict against him. The cases of bail bonds, and replevin bonds, are also distinguishable: for there the only sum mentioned is the penalty, and the indorsement of that upon the writ could afford the defendant no useful information, which is the purpose of the rule. As to the objection that the plaintiff is suing, as common informer, as well for her Majesty, as for himself, that can make no difference; as a payment to him would be a good discharge, and the remedy of the Crown, after payment, is against the informer. With respect to the form of the rule, it is clear that it is correctly framed: for the defendant could not ask to set aside the writ itself. He could not craveoyer of the original writ. It is submitted that it is only upon the copy of the writ, that the indorsement by the rule of Court is required to be made. As regards the affidavit, it sufficiently appears on the face of it, as also by

(a) 1 Dowl. 654; Nom. *Hasker v. Jarmaine*, 1 Cr. & M. 408.

(b) 6 Dowl. 173; See S. C. 3 M. & W. 69.

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the copy of the writ annexed to it, that the action is brought to recover a debt.

PATTESON, J.—It appears to me perfectly clear, that the rule of Hilary Term, 2 Wm. 4, which has been referred to, does not apply to the present case. It says, “that upon every bailable writ and warrant, and upon the copy of any process served *for the payment of any debt*, the amount of the debt shall be stated,” &c. Now here I think is clearly meant a debt arising out of a contract between the parties, subsisting at the time of the suing out the process; and not a penalty under an act of Parliament, which every one who pleases may sue for and recover. The case of *Davies v. Lloyd* (a), it is true, is not precisely in point; for there the judgment seems to have proceeded upon the consideration of a peculiarity in that case, which does not exist in the present one. I do not think, however, that that circumstance alters the question. Looking at the purpose for which the rule was framed, I am of opinion, that the word “debt” clearly means a debt on a contract between the parties, and not a penalty which may be sued for by all mankind. As to the objection to the form of this motion, I would not have it supposed that I think it right to move to set aside the service. I have some doubt on that point; but I do not think it necessary to decide that question, as I dispose of the motion on the first ground. The rule must, therefore, be discharged.

Rule discharged (b).

(a) 6 Dowl. 173; See S. C. 3 M. & W. 69.

(b) See the following case.



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FITZBALL v. BROOKE (a).

(In the full Court.)

THIS was an action of debt, under the 3 & 4 Wm. 4, c. 15, s. 2 (b), to recover the penalty of 40s., for each of six several representations of a certain dramatic piece, called "The Momentous Question," of which the plaintiff was the author (c). It appeared, that final judgment had

Where an action of debt was brought under the 3 & 4 Wm. 4, c. 15, s. 2, to recover the penalty of 40s. for each of six several representations of a dramatic piece of which the plaintiff was the author; and judgment was signed by default for 12l. debt, and 10l. 15s. costs; and the defendant was taken in execution under a ca. sa., indorsed to levy those sums: *Held*, that he was entitled to be discharged, under the 7 & 8 Vict. c. 96, s. 57; and that the action was one "for the recovery of a debt," within the meaning of that section.

(a) This case was decided in Hilary Vacation, 1845.

(b) "That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietors, in any Court having jurisdiction in

such cases in that part of the said United Kingdom or of the British dominions in which the offence shall be committed; and in every such proceeding where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same."

(c) The declaration was in the following form:—

"That whereas heretofore and before the committing of the several grievances by the defendant as hereinafter in this count mentioned, and after the passing of a certain act of Parliament, made and passed in the third year of the reign of his late Majesty King William the Fourth, intituled, 'An Act to amend the Laws relating to Dramatic Literary Property,' to wit, on the 26th day of March, A.D. 1843, the plaintiff did compose, print, and publish, a certain dramatic piece, called 'The Momentous

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been signed, for want of a plea, for the sum of 12*l.*, on the 16th of January, and costs thereon taxed at 10*l.* 15*s.*; and that a ca. sa. had issued, indorsed to levy 22*l.* 15*s.*, and

Question,' and from the time the same was so composed, printed, and published, as aforesaid, hitherto, the plaintiff hath been and still is the proprietor thereof, and during all the time aforesaid, has had, as his own property, the sole liberty of representing, or causing to be represented, the said dramatic piece, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions. Nevertheless, the plaintiff says, that after the making and passing of the said act of Parliament, and within twelve calendar months next before the commencement of this suit, and also whilst the plaintiff was such proprietor of the said dramatic piece as aforesaid, and had such sole liberty of representing or causing to be represented the same, as aforesaid, during the continuance of such sole liberty as aforesaid; he, the said defendant, on divers, to wit, on six several occasions, to wit, on the 6th, on the 9th, on the 10th, on the 11th, on the 12th, and on the 13th days of September, A.D. 1844, contrary to the intent of the said act of Parliament, and the right of the plaintiff, as such author, as aforesaid, and without the consent, in writing, of the plaintiff first had and obtained, did cause certain parts of the said

dramatic piece to be represented at a certain place of dramatic entertainment in England, to wit, at the Theatre Royal, Church Street, late at Liverpool, in the county of Lancaster, contrary to the form of the statute in such case made and provided, and the true intent and meaning thereof; and contrary to the right of the plaintiff, as author, as aforesaid, and also to his great injury, loss, and damage: Whereby, and by force of the statute in such case made and provided, the defendant, in respect of each and every of the said representations, became liable to pay to the plaintiff, being such author and proprietor as aforesaid, and having such sole liberty as aforesaid, an amount not less than 40*s.*, or the full amount of the benefit or advantage arising from such representations, or the injury and loss sustained by the plaintiff, therefrom, whichever should be the greater damages. And the plaintiff says, that the sum of 40*s.* was the greatest damages recoverable by the plaintiff, according to the form of the statute in such case made and provided, in respect of each representation of the said piece by the defendant, as in this count mentioned, whereof the defendant had notice. Whereby, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff, to demand and have, of and from the defendant,

interest. Under this writ, the defendant had been taken in execution, from which he was released, on payment, under protest, of the sum indorsed with the sheriff's expenses, amounting to 26*l.* 11*s.* He then obtained a summons, returnable before a Judge at Chambers, calling on the plaintiff to shew cause, "why the *ca. sa.* issued in this cause should not be set aside, with costs, the debt for which this action is brought, and for which judgment is signed, being under 20*l.* ; and why the plaintiff should not refund the sum of 26*l.* 11*s.*, paid to the sheriff, the plaintiff, or his attorney, on the execution of the said *ca. sa.*" The parties attended before Mr. J. *Wightman*, on the 28th of January, when that learned Judge made the order in the terms prayed for.

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Ogle now moved (*a*) to discharge the above order, and that the sheriff be directed, upon service of the rule, not to part with the money in his hands until the rule be decided. The recent act, 7 & 8 Vict. c. 96, s. 57, it is submitted, does not apply to the present case. That section enacts, that after the passing of the act, "no person shall be taken or charged in execution upon any judgment obtained in any of her Majesty's superior Courts," &c., "in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of twenty pounds, exclusive of the costs recovered by such judgment." The present is not an action "for the recovery of a debt;" but an action for the recovery of a sum of money given by way of damages, for the infringement of a right conferred upon the plaintiff by the 3 & 4 Wm. 4, c. 15. By sect. 1 of that act, the sole right of representing any dramatic piece

six several sums of 40*s.* each, making together the sum of 12*l.*, the sum above demanded. Yet the defendant, although often requested so to do, hath not paid the said sum above demanded, or any part thereof, to the plain-

tiff; but hath hitherto wholly refused, and still doth refuse, so to do. To the plaintiff's damage of 10*l.*, and thereupon he brings his suit, &c."

(*a*) On the last day of Hilary Term, 1845.

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is given to the author for a limited number of years; and by sect. 2, a remedy is provided in cases of infringement, that "the offender shall be liable for each and every such representation," (i. e., a representation without consent of the author,) "to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author," &c.; but it is nowhere said, that the sums to be thus recovered, shall be recovered by action of debt; and the words "whichever shall be the greater damages," clearly shew, that it is to be considered in the nature of "damages." These actions are frequently brought, and it is never thought necessary to indorse the amount which the plaintiff seeks to recover on the back of the writ, or to furnish any particulars of demand; nor has this been done in the present case. The case of *Davies v. Lloyd* (a) shews, that an action of debt for a penalty under the Municipal Corporations Act, is not an action for the payment of a debt within the Uniformity of Process Act, requiring an indorsement on the writ of summons, of the amount of debt and costs, in pursuance of Reg. Gen., H. T., 2 Wm. 4, r. II., and Reg. Gen., M. T., 3 Wm. 4, r. V. The sum of 40s. for each representation is a quasi penalty; the jury might have given greater damages, if they had been of opinion that the plaintiff had sustained greater injury than to the amount of 40s. for each representation. [*Coleridge, J.*, referred to *Fife v. Bousfield* (b).] There, an action was brought on the statute, 1 & 2 Ph. and Mary, c. 12, s. 3, which prohibits the taking more than a certain sum by way of poundage on a distress, "on pain of five pounds, to be paid to the party grieved;" and the action being at the suit of the party aggrieved, the Court held, that it was not a penal action, so as to require the venue to

(a) 3 M. & W. 69; See S. C. p. 474.

6 Dowl. 173. See the preceding case of *Hobbs v. Young*, ante, (b) See note (A.) at the end of this case.

be local under the 31 Eliz., c. 5, s. 2, or the 21 Jac. 1, c. 4, s. 2. This is also an action at the suit of the party aggrieved; and a very trifling difference in the language of the declaration, would have made it clearly an action for unliquidated damages.

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Cur. adv. vult.

LORD DENMAN, C. J. (a)—We have considered this case, and are of opinion, that the defendant was entitled to his discharge, under the recent Insolvent Act. There will, therefore, be no rule.

Rule refused.

(a) In Hilary Vacation, 1845.

(A) *FIFE v. BOUSFIELD.*

(*In the full Court.*)

DEBT. Venue Middlesex. The declaration stated, that before, &c. one W. M. C. had taken the horse of the plaintiff as a distress, and impounded it in a certain public pound, to wit, at Streatham, in the county of Surrey, whereof the defendant then was the keeper; "and the said defendant so being such keeper as aforesaid, afterwards, and whilst the said horse was so impounded as aforesaid, to wit, on, &c., aforesaid, demanded and then took from the plaintiff, for keeping in pound the said distress, to wit, the sum of 3s., being more than the sum of 4d. for one whole distress; whereby and by force of the statute in such case made and provided, an action hath accrued to the plaintiff, being the party grieved, to demand and have from the defendant the sum of 5l., and also the further sum of 2s. 8d., the said last mentioned sum of money being the sum of money which the defendant took above the sum of 4d. for such whole distress." Yet that the defendant, although often requested, &c., had not paid to the plaintiff the said sums of 5l. and 2s. 8d., or either of them, &c. There were the common counts for money had and received, and for money due on an account stated.

Pleas. As to the first count, nil debet, by statute. As to the two last, nunquam indebitatus, also by statute.

An action under the 1 & 2 Ph. and Mary, c. 12, s. 2, by the party aggrieved, is not a penal action within the 31 Eliz. c. 5, s. 2, or 21 Jac. 1, c. 4, s. 2, so as to require the venue to be local.

The declaration should state the offence to be, contra formam statuti; and it is not sufficient to allege facts which would bring the defendant within the statute, and that "by means thereof, and

by force of the statute," an action hath accrued to the plaintiff.

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At the trial before Mr. J. *Wightman*, at the sittings after Trinity Term, 1843, it appeared that nine horses of the plaintiff had been distrained for trespassing on the land of one W. M. Coulthurst, at Streatham, in the county of Surrey; but that only one had been impounded. The pound-keeper, however, demanded and received the sum of 3*s.*, being at the rate of 4*d.* for each of the nine horses. The jury returned a verdict for the plaintiff on the first count, and for the defendant on the other counts; the defendant having leave to move to enter the verdict in his favour, or for a nonsuit, on the ground that the venue was local.

A rule nisi having been obtained accordingly, and also for arresting the judgment, on the ground that the declaration did not state that the act done was an act done against the form of any statute;

Platt, with whom was *Chadwicke Jones*, shewed cause. This is an action on the 1 & 2 Ph. and Mary, c. 12, s. 2, which enacts, "that no manner of person shall take for keeping in pound, impounding, or poundage of any manner of distress, above the sum of fourpence for any one whole distress that shall be so impounded; and where less hath been used, then to take less; upon the pain of five pounds, to be paid to the party grieved, over and beside such money as he shall take above the sum of fourpence, any usage or prescription to the contrary notwithstanding." It is said that this is a penal action; and that, therefore, the venue is local, under the 31 Eliz. c. 5, s. 2, or under the 21 Jac. 1, c. 4, s. 2. But the distinction is, that this is an action at the suit of the party aggrieved, and therefore not within those statutes, which apply merely to suits by common informers. *Culliford v. Blandford*, (Carth. 232;) Bull. N. P. 196. The following cases were also cited; *Eaton v. Barker*, (1 Vent. 133;) *The Company of Cutlers in Yorkshire v. Ruslin*, (Skin. 368;) and *The Corporation of Plymouth v. Collings*, (Carth. 230). As to the second ground of objection, that the declaration does not allege it to be an act done contrary to any statute, it sufficiently appears that it is so, on the face of the declaration, and also by the allegation, "whereby and by force of the statute, an action hath accrued to the plaintiff, &c."

Taprell, in support of the rule. The case of *Earl Spencer v. Swannell*, (3 M. & W. 154; S. C. 6 Dowl. 326,) shews that this is in reality a penal action. That being so, the terms of the stat. 31 Eliz. c. 5, s. 2, apply; and they are no where restricted to the case of actions by common informers. In *Barber v. Tilson*, (3 M. & S. 434,) Lord *Ellenborough* says it is a statute of "universal operation and extent." And in *Whitehead v. Wynn*, (5 M. & S. 429,) his Lordship uses similar language. The exception in the first section, and those in the subsequent sections, are strong evidence against any other exceptions than those named. But if the present action be not within that statute, at least it is within the 21 Jac. 1, c. 4, s. 2. The point which was argued in *Pope v. Davis*, (2 Taunt. 252,) could not have

arisen, if it had not been taken for granted that the venue in an action under the 1 & 2 Ph. and Mary, c. 12, is local. The decision in the case of *Culliford v. Blandford*, did not turn on the construction to be put upon the 21 Jac. 1, c. 4, s. 2. He cited also *The Attorney-General v. Browse*, (Bunb. 236,) and *The Attorney-General v. Moyer*, (Bunb. 261.) With respect to the second ground of objection, *Lee v. Clarke*, (2 East, 333,) and *Wells v. Iggulden*, (3 B. & C. 186; S. C. 5 D. & R. 13,) are expressly in point. (He was stopped by the Court.)

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Lord DENMAN, C. J.—As regards the last point, there is no doubt that the judgment should be arrested. The only answer that has been attempted to be given is, that the declaration discloses an offence against the statute; but the same might be said in every case in which the objection has been allowed. In *Lee v. Clarke*, (2 East, 333,) Lord *Ellenborough* observes, that the allegation, which is here omitted, has always been considered necessary. And the case of *Wells v. Iggulden*, (3 B. & C. 186,) is also precisely in point. We therefore think that so much of the rule as relates to arresting the judgment, should be made absolute. As to the other alternative of the rule, which, if decided for the defendant, will be much more beneficial to him, the Court will take time to consider their judgment.

Cur. adv. vult.

Afterwards, in Trinity Term, 1844,

Lord DENMAN, C. J., delivered the judgment of the Court. (His Lordship shortly stated the pleadings.)—Upon the trial, a verdict was taken for the plaintiff on the first count, and for the defendant on the two last. The venue was laid and the cause was tried in Middlesex, but the offence was committed in Surrey. A rule nisi has been obtained, on leave reserved, to enter a verdict for the defendant or for a nonsuit, on the ground that the venue was local, either by 31 Eliz. c. 5, s. 2, or by 21 Jac. 1, c. 4, s. 2. We are of opinion, however, that neither of these statutes applies to an action of debt by the party aggrieved, to recover a penalty given to him. Both these statutes have the same object,—the regulation of proceedings by informers; and, although some of the sections appear applicable to all penal actions, it may be considered now to be settled, that neither the first of these statutes, nor the first nor second clause of the second, extend to penal actions brought by the parties aggrieved. With regard to the statute of Elizabeth, it has been expressly decided, that it applies only to common informers, and not to a party aggrieved; *Allen v. Stear*, (Cro. Eliz. 645,) and *Culliford v. Blandford*, (Carth. 232.) The effect of the statute of 21 Jac. 1, c. 4, s. 2, is, as is observed by Mr. Baron Parke, in giving judgment in the case of *The Earl Spencer v. Swannell*, (3 M. & W. 163,) “to re-enact the provisions of the 31 Eliz. c. 5, s. 2, with some alteration as to the mode of taking advantage of the objection, and to enforce the laying the

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venue in the proper county;" and the second section has, not only in that case, but in *Barber v. Tilson*, (3 M. & S. 429,) been determined to apply only to cases of proceedings by informers; and to the same effect is the passage which has been referred to, in Bull. N. P. p. 196. In the case of *Pope v. Davis*, (2 Taunt. 252,) this point was not taken or alluded to, either in the argument or in the judgment; although the action was on the statute of 1 & 2 Ph. and Mary, c. 12. The question there discussed was, in which of the two counties the venue should be laid. We are, therefore, of opinion, that so much of the rule as relates to the entry of a verdict for the defendant, or of a nonsuit, must be discharged.

It was necessary to examine this point, because the defendant had obtained a rule for a verdict or for a nonsuit, either of which would have been much more beneficial to him than an arrest of judgment. We have, however, already declared our opinion, that the rule in the latter alternative must be made absolute.

Rule absolute, for arresting the judgment.

DENNETT v. HARDY.

Where in an action to be tried before the sheriff, two issues had been joined, and the plaintiff made up the award of the writ of trial with a venire to try the issue between the parties: *Held*, that the issue thus delivered was defective, and that the defendant might come to the Court to have it amended, at the plaintiff's cost; and that

he was not bound to make the application at Chambers, in Term time.

Held also, that the above defect was no ground for setting aside the notice of trial.

Seemle, where the plaintiff adds the similiter for the defendant, and delivers the issue with an award of a writ of trial, leaving blanks for the dates of the teste and return of the writ, that the issue thus delivered is irregular:

Also, that where it is for the plaintiff to add the similiter for the defendant, the Judge's order for the writ of trial should first be obtained, before the plaintiff delivers the issue, which may then contain the proper date.

A RULE had been obtained, calling on the plaintiff to shew cause why the issue and notice of trial delivered in this cause should not be set aside for irregularity; or why the defects therein should not be amended at the costs of the plaintiff.

This was an action of debt, for use and occupation, to recover the sum of 2*l.* 10*s.*, for a quarter's rent, due to the plaintiff, and for money due on an account stated.

The defendant pleaded *nunquam indebitatus* as to the last count; and as to the first, a special plea, which the plaintiff traversed.

The plaintiff had thereupon made up the issue, adding the similiter for the defendant, with an award of the writ of trial as follows:

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the said writ of summons, does not exceed 20*l.*, hereupon, on the (a) day of November, in the year 1844, pursuant to the statute in that case made and provided, the Judge of the Sheriff's Court of the city of London, being a Court of Record for the recovery of debts in the said city, is commanded that he summon twelve, &c., who neither, &c., who shall be sworn truly to try the issue above joined between the parties aforesaid, and that he proceed to try such issue accordingly, and when the same shall have been tried, that he make known to the Court here what shall have been done by virtue of the writ of our Lady the Queen, to him in that behalf directed, with the finding of the jury thereon indorsed, on the 28th day of November, &c. (b) .

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The affidavit in support of the motion stated, that the issue in the above form and notice of trial for the 28th of November, had been delivered to the defendant on the 18th day of November; that on the 19th, search was made among the precipes of all the writs of trial issued in this Court from the 12th of November instant, in order to ascertain if any writ of trial had been issued in the above cause, and that it was ascertained that none had been issued. The affidavit in opposition shewed that it was the practice to deliver issues with an award of a writ of trial, without first obtaining the writ itself; as in the event of the action being settled, the Master would not allow the costs of the writ, if it had been sued out many days before the trial. That the present writ of trial had been sued out accordingly on the 22nd of November. That no application had been made to a Judge at Chambers, nor any notice or application to the plaintiff to amend.

Bovill shewed cause. The issue is made up in the form prescribed by the Reg. Gen., H. T., 4 Wm. 4, Form, No. 4.

(a) There was a blank left here.

(b) The case was argued as if there had been also a blank left here.

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It is quite impossible that the plaintiff can insert the proper dates of the writ of trial, as at the time of delivering the issue, he has not obtained it. It was for the plaintiff to make up the issue; Reg. Gen., 2 Wm. 4, r. 1, s. 108; and as it was one which must be tried by an inferior Court, he was bound to make it up in the form prescribed for that purpose. It is the practice not to sue out the writ before delivering the issue. And this practice is recognised by the Masters on taxation; for they will not allow the costs of a writ of trial if the action be settled in the meanwhile. The object of inserting the award of a writ of trial, is not to inform the other party of its being issued; for a notice of the application must be served on him before the Judge's order can be obtained. It is merely to shew how the proceedings stand, when the record comes to be made up. Besides, even if this were a valid objection, the defendant should have made it the subject of an application to Chambers, and not have come to the Court; *Ikin v. Plevin* (a). At any rate the notice of trial is good; and the rule cannot succeed on that point.

Horn, in support of the rule. It is in the power of the plaintiff to insert the dates of the writ of trial in the issue delivered, for he must know when he means to apply for it. The form given by Reg. Gen., H. T., 4 Wm. 4, No. 4, says expressly, that in the blank which is there left, the teste of the writ of trial is to be inserted. [*Patteson*, J.—Unfortunately, the form leads to some difficulty; for if the party were to apply for a writ of trial before the issue had been delivered, that might also form a ground of objection.] In *Ball v. Hamlet* (b), it was held that the issue must contain the date of the pleadings, for that was prescribed by the form given in the rules. At all events, the plaintiff should have applied for leave to amend it; *Ward v. Peel* (c).

(a) 5 Dowl. 594.

(c) 1 M. & W. 743; See S. C.

(b) 1 C., M. & R. 575; See S. C. 5 Dowl. 169.

5 Tyr. 201; 3 Dowl. 188.

That case is also an authority for the present application to the Court. Counsel are not heard at Chambers during Term time; and it would therefore be a very great hardship in motions of a nature similar to the present, if parties might not elect to come to the Court. The authority of *Ikin v. Plevin* (a) has been doubted. [*Patteson, J.*—How do you say the plaintiff should have avoided this defect?] He should perhaps have allowed the defendant to complete the issue by rejoining; and then he could at once have obtained his writ of trial, and completed his issue regularly. [*Patteson, J.*—It would be useless to require the defendant to add the similiter, when the rule of Court empowers the plaintiff in a case like the present to make up the issue.] There is another defect in the issue. The jury are to be summoned to try the “issue,” instead of the “issues” joined between the parties. How can it be said which issue the Judge of the inferior Court is empowered to try.

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PATTESON, J.—The issue is certainly defective in one respect, namely, in awarding the writ of trial, to try the “issue” instead of the “issues,” joined between the parties. This is clearly wrong, and as to that part the plaintiff must amend. As respects the other objection, that the date of the teste of the writ of trial should have been inserted, that is a matter which it would be very desirable should be settled. The act of Parliament says, that the Court or a Judge shall direct the issues to be tried before the sheriff, “if such Court or Judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such Court or Judge shall think fit so to do.” Now, how can the Judge be satisfied of this, until the issue be complete? How can it even be fixed before whom the trial is to take place, whether before the sheriff or the Judge of an inferior

(a) 5 Dowl. 594.

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Court of Record? The difficulty here is, that the rejoinder was to come from the defendant; so that the issue was not complete when the plaintiff delivered it; for the defendant might have struck out the similiter, and demurred to the plaintiff's replication. There is no doubt that if a Judge's order had been first obtained, and the plaintiff had sued out the writ, and afterwards delivered the issue with wrong dates, he must have amended it. I am rather inclined to think that the order for the writ of trial ought first to be obtained; and if it be, the dates could then be inserted; and, looking at the form given by the rule, it seems to me that that ought to be done. At the same time, it is not necessary to decide the point now, as the plaintiff being obliged to amend the other defect, can amend this also. The rule will, therefore, be absolute for the plaintiff to amend the issue; but the notice of trial must stand.

Rule absolute accordingly.

REGINA v. The JUSTICES of the West Riding of YORKSHIRE,
(Stanley cum Wrenthorpe v. Alverthorpe with Thomes.)

A notice of appeal against an order of removal of a pauper may be given, after the 21 days from the time of sending the notice of chargeability, &c. required by the 4 & 5 Wm. 4, c. 76, s. 79, and before an actual removal.

THIS was a rule for a mandamus to the Justices of the West Riding of Yorkshire, commanding them to enter continuances, and hear an appeal against an order of removal of Mary Abson, and her two children, from the township of Alverthorpe with Thomes, in the said Riding, to the township of Stanley cum Wrenthorpe, also in the said Riding. The order was made on the 29th of July last, and the notice of chargeability, and copy of the examinations, had been duly sent, and received by the respondent township, on the 2nd of August. The notice of appeal was not served till the 24th of the same month, consequently, more than twenty-one days after the notice of the order of

removal. No removal took place before the Michaelmas Sessions, when the appeal was entered and called on. It was then objected, that there had been no sufficient notice of appeal. It was contended, that there being no actual removal, the appellants were not "aggrieved," within the meaning of 13 & 14 Car. 2, c. 12, s. 2; and that to bring themselves within the 4 & 5 Wm. 4, c. 76, s. 79, which substitutes the notice as the grievance, for the actual removal, a notice within the twenty-one days was required. The magistrates adopted this view, and dismissed the appeal; upon which the present rule had been obtained.

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Hall, with whom was *Overend*, shewed cause. It is submitted, that there is no power of appeal at common law, and that it is not conferred by statute, except by express terms; *Rex v. Hanson* (a), *Rex v. Skone* (b), *Regina v. Stock* (c). Under the old statutes, there was no power of appeal until the actual removal of the pauper; *Rex v. Inhabitants of Norton* (d), *Rex v. Justices of Herefordshire* (e), *Regina v. Justices of Salop* (f). The statute 4 & 5 Wm. 4, c. 76, s. 79, in permitting an appeal within twenty-one days after notice of chargeability, without an actual removal, in fact, confers a new right of appeal, which is to be taken subject to the terms of that section, one of which is, that it must be given within the twenty-one days. If the notice of appeal, therefore, be not given within that time, the case is no longer within the express terms of the section, and if not within the express terms, the party appealing must shew a grievance; the grievance can only exist by virtue of the old law, where there is an actual removal, which is not the case in the present instance. The following cases were also cited; *Rex v. Justices of*

(a) 4 B. & A. 519.

3 N. & P. 420.

(b) 6 East, 514; See S. C.
2 Smith, 642.

(d) 2 Strange, 831.

(e) 3 T. R. 504.

(c) 8 A. & E. 405; See S. C.

(f) 6 Dowl. 28.

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Pashley (with whom was *Pickering*) in support of the rule. It is conceded that there may be an appeal after the twenty-one days have expired, on the actual removal; but it is said, there is an intermediate space of time between the expiration of the twenty-one days and the removal of the pauper, during which an appeal cannot be made. But there is no foundation for this distinction in the cases that have been cited, or upon principle. In practice, it might be extremely inconvenient; as, if the power of appeal were taken away after the lapse of twenty-one days, except in the case of an actual removal, a parish on whom a notice of chargeability had been served, might remain ultimately liable for the expenses for a considerable period of time, without any power of contesting the question. It is clear, however, that since the 4 & 5 Wm. 4, c. 76, the parish upon whom a notice of chargeability is served, is aggrieved from the time of service of that notice; for by sect. 84, their liability to the pauper's expenses accrues from that date. They cited *Rex v. Justices of Leicester* (k), *Rex v. Justices of Suffolk* (l), *Regina v. Justices of Middlesex* (m), *Regina v. Stock* (n), Stat. 3 Wm. and M. c. 11.

WIGHTMAN, J.—This is said to be a novel case; but I

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| (a) 4 A. & E. 319; See S. C. | (g) 9 Dowl. 163. |
| 5 N. & M. 503. | (h) 1 Dowl. 570, N. S. |
| (b) 3 B. & C. 548; See S. C. | (i) Trinity Term, 1843, Q. B. |
| 5 D. & R. 347. | (k) 4 Dowl. 633. |
| (c) 4 Dowl. 633. | (l) 4 A. & E. 319. |
| (d) 6 A. & E. 894. | (m) 9 Dowl. 163. |
| (e) 6 Dowl. 28. | (n) 8 A. & E. 405. |
| (f) 8 Dowl. 638. | |

am not struck with any great difficulty in it. The statute of Charles gave the party aggrieved by the order of removal, a right of appeal; but it was contended, that under that statute a mere order of removal constituted in itself no grievance; and, therefore, that no appeal could be prosecuted until an actual removal took place. But now by the recent statute, the grievance commences from the time when the notice of chargeability and other documents are served upon the opposite party; for, from that time, they become liable by the 84th sect. for the expenses of the pauper, if he be ultimately adjudged to belong to their parish. The cases of *Rex v. Justices of Suffolk* (a), and *Regina v. Justices of Middlesex* (b), which have been cited at the Bar, shew, that if the notice of appeal be not given within the stipulated period, the party may still appeal upon actual removal of the pauper. It is said, however, that where the twenty-one days have expired, there must be an actual removal to give the party this right. But I can see no foundation for this distinction. The only reason that is suggested why an appeal would not lie under the statute of Charles, till actual removal, is because there was till then no grievance. That defect, however, is supplied by the recent act, which makes the service of the document a grievance; since from that time the ultimate liability to the expenses of the pauper are incurred. I therefore think that this rule must be made absolute.

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Rule absolute.

(a) 4 A. & E. 319.

(b) 9 Dowl. 163.

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The affidavit of service of notice of an application for a certiorari, under 13 Geo. 2, c. 18, s. 5, stated that the notice was served on two justices, who were "two of the justices present at the Midsummer General Quarter Sessions, &c., held at, &c., on, &c., at which sessions the appeal was heard and confirmed," &c. Held insufficient, for not stating in terms, that the justices were present at the hearing and confirming of the appeal. Held also, that the fact of the sessions having granted a special case, did not dispense with the necessity of giving the notice.

Seem, that a notice signed by "G. K., attorney for the said overseers of the poor of the said township of D. appellants," is sufficient; without any affidavit of signature, or of authority to give the notice.

REGINA v. The INHABITANTS of the Township of DARTON.

A RULE had been obtained (a) calling on the defendants to shew cause why a writ of certiorari which had issued to remove all orders made by the Justices of the West Riding of Yorkshire, between the overseers of the poor of the township of Darton, in the West Riding, appellants, and the overseers of the poor of the township of Bretton West, in the same Riding, respondents, touching the settlement of S. P., his wife and family, should not be quashed. It appeared, from the affidavit of Wm. Stewart, attorney for the respondent township, in support of the present motion, that an appeal against an order of removal under the hands and seals of T. H. and E. T. Esqrs., two of, &c., of a pauper, his wife and family, had been tried at the Midsummer Quarter Sessions, 1843, for the West Riding of Yorkshire, "before the Honorable Edwin Lascelles, chairman, John Fullerton, Esq., and others, their fellow Justices, &c.;" and that the order of removal was confirmed, subject to a right on the part of the appellants to have a case stated for the opinion of the Court of Queen's Bench, as to the admissibility of a certain indenture, which had been received in evidence. The present writ of certiorari had been thereupon moved for to bring the case up; and the application which was now made to quash it, was on the ground that the affidavit on which it issued was defective, in not shewing that the justices served with the notice required by the 13 Geo. 2, c. 18, s. 5, were two of the justices "by and before whom" the order was made; and also that it did not shew that the party giving the notice was authorized to do so by the parties suing forth the writ of certiorari, or

(a) In Easter Term.

that the application for the writ had been made by the appellants. The affidavit upon which the writ had been granted was made by "Thomas Green, clerk to George Keir, of Barnsley, in the county of York, attorney at law," and stated that deponent "did, on the 18th of November, instant, personally serve John Thorneley, Esq., and the Rev. Henry Watkins, clerk, two of her Majesty's justices of the peace in and for the said West Riding," each of them with a duplicate of the notice thereunto annexed: and "that the said John Thorneley and Henry Watkins, were two of the justices of the peace present at the Midsummer General Quarter Sessions of the peace, held at Rotherham on the 3rd day of July last past, at which sessions the appeal mentioned or referred to in the notice hereunto annexed came on for hearing, and was heard accordingly, and the order appealed against was confirmed, subject to a case." The notice, which was annexed to the affidavit, was regular in form, and was addressed to the above justices, and signed "George Keir, attorney for the said overseers of the poor of the said township of Darton, appellants." There was also a further affidavit in answer to the present motion by George Keir, "that he continually hath been and still is the attorney for the churchwardens and overseers of the said township of Darton, in the said appeal, and has during all that time been known to be such attorney by the respondents in the said appeal, and by Wm. Stewart, then and now their attorney." That on receiving the draft of the case on the 11th day of November, 1843, he forwarded it on the 14th to Mr. Stewart, the attorney for the said respondents, with a letter requesting him to give a consent brief on the application for a certiorari. That not receiving an answer, he prepared "a notice to two of the justices present at the said sessions," and caused it to be served on them. That he afterwards received a letter from Mr. Stewart, offering to give consent briefs, if he would pay the fees. That afterwards the writ was moved for and obtained without any opposition; no consent

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briefs being given, as he believed, because considered unnecessary.

Hall now shewed cause. As to the objection that it does not appear that the notice was served, or that the application was made on behalf of the overseers of the appellant township, but only by a party describing himself as attorney for the overseers: it is submitted that that is sufficient, unless negatived by affidavit on the other side; *Rex v. Inhabitants of Abergele* (a), *Regina v. Solly and Another* (b), *Regina v. Justices of Lancashire* (c). As to the principal objection, it resolves itself into two points: first, whether any notice to the justices at all be necessary, this appearing on the affidavit to be a special case, and, therefore, their consent presumed: and secondly, whether if it be, the present notice be not sufficient. It is submitted, that the statute does not apply to cases like the present, where a consent has been, in point of fact, given, by granting a special case. The sessions have in truth requested the opinion of this Court upon a certain state of facts; and it cannot be necessary to go through the form of requiring their consent to take the proper steps for obtaining that opinion. In cases of consent it is the practice to get a side-bar rule for a certiorari as a matter of course. In the present case it may be observed, that the certiorari is grantable by common right. The notice is required by the stat. 13 Geo. 2, c. 18, s. 5, merely that the justices may shew cause if they think fit, against the case being removed. But this cannot be necessary, when they themselves have consented to the removal. The practice is in conformity with the view here submitted; for when a certiorari is demanded to remove a special case, it issues on a side-bar rule, the same as in cases of consent. And there is this further reason why no notice should be required, that the two justices

(a) 5 A. & E. 795; See S. C.
1 N. & P. 235.

(c) 11 A. & E. 144; See S. C.
3 P. & D. 86.

(b) 9 Dowl. 115.

served with the notice might come and oppose the rule; while the rest of the justices might still wish to have the decision of this Court on the point. In the case of *Regina v. Cartworth* (a), it is true that it was held that the circumstance of a special case being granted, did not dispense with the necessity of the notice to the justices: but that case is distinguishable; as it does not appear there that the fact of a special case having been granted, was stated in the affidavit on which the writ was obtained. [*Patteson*, J., referred to the case of *Rex v. Justices of Sussex* (b).] The dicta of the Court in that case are certainly against the view now submitted; but the decision to which the Court came was simply that a consent to a certiorari issuing, is only a consent to its issuing within due time. If, however, on the present occasion, it should be decided that a notice is necessary; then, it is submitted, that the notice given is sufficient. The notice is given to J. T. and H. W., "two of her Majesty's justices of the peace in and for the West Riding." They are described as being "two of the justices of the peace present at the Midsummer General Quarter Sessions of the peace, held at Rotherham on the 3rd day of July last past, at which sessions the appeal mentioned or referred to in the notice hereunto annexed came on for hearing, and was heard accordingly, and the order appealed against was confirmed," &c. The fair and ordinary presumption is, that they were present at the hearing of the appeal. It does not appear that the sessions lasted more than one day, or that there was any adjournment or change of the Court. The usual form of an order of sessions never shews who are the justices present at the particular time when made. [*Patteson*, J.—The defect in the present instance is, that it does not in terms state that these justices were present at the hearing, or that the order was made by them.] If an extreme precision is required, it may not be sufficient to prove that they were sitting on the

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(a) *Ante*, vol. 1, p. 837.

(b) 1 M. & S. 631.

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bench; for they may not have been attending, or taking any part in the trial of the appeal.

Pashley, in support of the rule. With respect to the first point, the case of *Regina v. Justices of Lancashire* (a), is no authority; for there the present objection was not taken. The affidavit should have stated that Keir was authorized to give the notice. [*Patteson, J.*—The notice is good on the face of it; but you object that it is not shewn by the affidavit that the party giving the notice is what he represents himself to be.] An attorney must be shewn to be authorized; *Lewis v. Lord Tankerville* (b). With regard to the main point, however, to ask the Court to hold that the granting a special case dispenses with the necessity of giving notice to the justices, is in point of fact seeking to induce the Court to overrule the cases of *Rex v. Justices of Sussex* (c), and *Regina v. Cartworth* (d). In the former case, Lord *Ellenborough*, C. J., says (e), “admitting that the magistrates may have wished, at the time when they settled the case, to have it brought up, still there may be reasons why they might think fit to shew cause; and unless it can be shewn that it could serve no possible end to give them six days’ notice, we cannot so presume. The statute appears to me imperative.” In *Regina v. Cartworth*, Lord *Denman*, C. J., says (f), “It is very necessary that the justices who were actually present when the order was made should be those on whom the notice is served. It may be that the order of sessions is bad on the face of it, or the justices may possibly have to show that the case was granted under a mistake, or upon a condition which has not been complied with. The distinction sought to be drawn between the case of a certiorari where the justices have granted a special case, and one where no such step

(a) 11 A. & E. 144; See S. C.
3 P. & D. 86.

(b) 11 M. & W. 109; See S. C.
2 Dowl. 754, N. S.

(c) 1 M. & S. 631.

(d) *Ante*, vol. 1, p. 837.

(e) 1 M. & S. 633.

(f) *Ante*, vol. 1, p. 841.

has been taken, is one which we cannot draw." If the notice be necessary, which it is submitted it is, the notice given is clearly insufficient. It is quite consistent that the justices may have been present during the transaction of the county business, and have taken no part in the trial of the appeals. In *Rex v. Rattislaw* (a), Mr. Justice Patteson says, "I am satisfied that the meaning of the act is, that the service should be on two of the justices by whom the order was made, and who were present at the time." The words of the statute are clear that the notice shall be given to two of the justices "by and before whom such order has been made;" and the words of the statute should be literally construed, as in the case of the formalities respecting the execution of a warrant of attorney; *Potter v. Nicholson* (b), *Poole v. Hobbs* (c).

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Cur. adv. vult.

PATTESON, J.—This was an application to quash a writ of certiorari, quia improvidè emanavit; and two points have been raised. First, whether under the circumstances of this case, it was necessary to give any notice at all to the magistrates of the application for the writ: and, secondly, if so, whether the notice given was sufficient. With respect to the first point, it has been argued that this being a special case stated at sessions, no notice to the justices of the application for the writ was necessary; as by granting a special case, a consent is implied. But, looking at the case of *Regina v. Justices of Sussex* (d), and the language there used by the Court, it seems quite clear that that question has been already virtually decided, and I cannot take upon myself to overrule that case. I must, therefore, hold, that a notice was necessary, notwithstanding the justices had granted a special case.

(a) 5 Dowl. 539.

(c) 8 Dowl. 113.

(b) 8 M. & W. 294; See S. C. 9 Dowl. 808. (d) 1 M. & S. 631.

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The question then arises, whether the notice that has been given is a sufficient notice under the 13 Geo. 2, c. 18, s. 5, to two of the justices "by and before whom" this order of sessions was made. Another point which was raised was, whether the notice which was given sufficiently appeared to have been given by the party suing forth the writ. It appears to have been served by a clerk to a Mr. Keir, and Mr. Keir's name is signed to the notice as attorney for the appellant township. But this is merely part of his description, and there is no positive statement to that effect in the affidavit. In the case of *The Queen v. The Justices of Lancashire (a)*, the notice was signed by "Crossley and Sudlow, solicitors for Mr. Richard Gould, a rate payer of the township of Manchester, within and part of the said borough;" and the Court held, that that was a sufficient statement of the notice being served on his behalf, and that they would presume the authority, as the other side had not ventured to contradict it. The affidavit there was made by Mr. Sudlow, one of the partners; but it did not verify the signatures, or state any authority from Mr. Gould, or shew that the notice was served on his behalf. The case is, therefore, in all essential respects, similar to the present. It is not necessary, however, that under the circumstances of the present case, I should decide this point; but I am inclined to think that the notice in these respects is sufficient.

The main question is, whether the right magistrates have been served. The act says, that no writ of certiorari shall be granted, "unless it be duly proved upon oath that the said party or parties suing forth the same, hath or have given six days' notice thereof in writing to the justice or justices, or to two of them, (if so many there be) by and before whom such conviction, judgment, order, or other proceeding shall be so had or made, to the end that such

(a) 11 A. & E. 144; See S. C. 3 P. & D. 86.

justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari." The order in question is an order of Quarter Sessions, and the affidavit on which this certiorari was obtained, states, that the deponent personally served J. Thorneley, Esq., and the Rev. H. Watkins, clerk, two of the justices of the peace for the West Riding of Yorkshire, with a copy of the notice required; and that they were "two of the justices of the peace present at the Midsummer General Quarter Sessions of the peace, held by adjournment at Rotherham, on the 3rd day of July last past, at which sessions the appeal mentioned or referred to in the notice hereunto annexed, came on for hearing, and was heard accordingly." I believe there is no affidavit to shew that the justices served were not present; but Mr. *Pashley* relies entirely on the insufficiency of the affidavit on which the rule was granted. Now, it is consistent with the statement there, that the justices served may have been present on one of the days on which the sessions were holden; (for, although in contemplation of law they are supposed to be holden on one day, it is notorious that they may, and sometimes do, last several;) and yet not have been present on that particular day on which this appeal was heard and tried. The statement, therefore, in this affidavit may be perfectly true, and yet they may not have been present at the time. The sessions may have lasted several days, and they may have only attended on one day; or they may have been present during part of the day, and been absent at the hearing of this particular appeal. It is no where stated that they were present at the hearing of this appeal; and I think the affidavit ought to have done that. The omission is certainly unfortunate; but I think I must hold parties strictly to the terms of the statute, and must therefore yield to this objection, and quash the writ.

It would be much better and certainly safer, if the parties

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would state that the justices to whom the notice is given, were present on the Bench at the time the appeal was heard and decided.

Rule absolute (a).

(a) REGINA v. The JUSTICES of HEREFORDSHIRE.

IN the present Term, *W. H. Cooke* moved for a writ of certiorari to remove an order made at the Michaelmas Quarter Sessions of the county of Hereford.

Skinner shewed cause in the first instance, on the affidavit of one of the two justices served with the notice, which stated that he was present in Court at the time the appeal came on to be heard, but "that upon an observation being made by the appellants that there was a large rate payer of the respondent parish on the Bench, he immediately stated that he had not taken any part in the proceedings of the Court as regarded the appeal; and that he did not intend to vote or act." The affidavit also stated "that he did not act or interfere in the determination of the said appeal." This gentleman, therefore, could not be said to be one of the justices "by whom" the order was made.

PATTESON, J., allowed time to *Cooke* to answer the affidavit; but said, that he thought, that if the fact were as above stated, that the party in question had given a public intimation that he would not interfere in the adjudication of the appeal, he was not a justice within the meaning of the statute; and that the notice, therefore, would be insufficient.

In re SIMONS.

A cause being referred to arbitration, an attorney of this Court was retained by the defendant's attorney, to conduct the defence before the arbitrator.

He afterwards delivered a signed bill to the defendant's attorney, in which he charged for "journey and tavern bill, attending and advocating four days as per terms, 12l. 12s.; posting and travelling expenses as per agreement, 3l. 4s.:" Held, that this was not a taxable bill.

IN this case it appeared, that an action in the Court of Exchequer, of *Davies v. Evans*, having been referred to arbitration, the attorney for the defendant, Mr. Lloyd, employed an attorney of this Court, of the name of Simons, to attend before the arbitrator, and conduct the case for the defence. Mr. Simons afterwards delivered a bill to

Mr. Lloyd, signed by himself, of which the following is a copy:

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JOHN LLOYD, Esq., to W. SIMONS.

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October.		£	s.	d.
	Journey to Lampeter and Tavern	12	12	0
	Bill, attending and advocating four			
	days on this reference, as per terms,			
	including fee with the Brief			
	Paid posting and travelling expenses,	3	4	0
	as per agreement with Mr. Thomas			
		<hr/>		
		£15	16	0

This is my Bill,

WILLIAM SIMONS.

Carmarthen, 15th October, 1844.

There was an affidavit by Mr. Lloyd that he had employed Mr. Simons in consequence of his being an attorney, and of the knowledge he had acquired from practising in that capacity.

Gray now moved to refer the bill to the Master to be taxed. It is submitted that this is a bill which may be properly taxed; the employment being in respect of the party's profession of an attorney, and such as an attorney might ordinarily perform. The words of the 6 & 7 Vict. c. 73, s. 37, which give the power to refer attorneys' bills to taxation, are very comprehensive, and include "fees, charges, or disbursements for any business done by such attorney or solicitor." The business done in the present instance stands very much on the same footing as the business performed by a London agent; and there can be little doubt that now a London agent's bill is taxable (a); and indeed would always have been so, but for the express

(a) See, however, *contra*, *Gedye v. Elgie*, Easter Term, 1845, *post*.

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enactment to the contrary in 12 Geo. 2, c. 13, s. 6. [Patteson, J.—On the face of this bill, the charge seems to be “by agreement.”] That will make no difference, except authorizing the Master in his discretion, to allow the full sum agreed on, *Drax v. Scroupe* (a).

Cur. adv. vult.

PATTESON, J.—I have mentioned this case to several of the Judges, and they all agree with me in opinion, that such a bill as this cannot be taxed; as it is for business done by Mr. Simons rather as an advocate than as an attorney. There will, consequently, be no rule.

Rule refused.

(a) 1 Dowl. 69.

STANDEWICK v. HOPKINS.

Where a rule for a new trial is drawn up on reading affidavits imputing personal misconduct and partiality to some of the jurymen, affidavits of such jurymen denying and explaining the conduct attributed to them, may be read on shewing cause against the rule.

THIS was an action which had been tried before the undersheriff of Somersetshire, and a verdict found for the plaintiff. An application had been made in the Vacation to a Judge at Chambers to stay execution, on affidavits imputing misconduct and gross partiality on the part of some of the jurors, which was granted. A rule nisi was obtained in the present Term for a new trial. It was drawn up on reading the affidavits filed at Chambers.

J. W. Smith shewed cause, and proposed to read the affidavits of three jurors, denying and explaining the misconduct alleged.

After verdict for the plaintiff before the undersheriff, a Judge at Chambers, in Vacation, had stayed proceedings on affidavits imputing misconduct to the jury. A rule nisi for a new trial was obtained, which was drawn up on reading the affidavits filed at Chambers: *Held*, that the party shewing cause might use affidavits in answer.

Prideaux, in support of the rule, objected; first, that no new affidavits having been used in obtaining the rule nisi, the plaintiff could not use affidavits on shewing cause; *Atkins v. Meredith* (a). And, secondly, that inasmuch as the affidavit of a juror could not be received to impugn a verdict given, *Straker v. Graham* (b), it would be unfair to permit him to make an affidavit to support it in any way.

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J. W. Smith, contra. This rule is drawn up on reading the affidavits filed at Chambers, and, therefore, the plaintiff has a right to use affidavits in answer. It may be true, as a general rule, that a juror cannot be heard to impugn or support the verdict; but where personal reflections of a serious kind are thrown out against the conduct and character of a juryman, public justice requires that he should be heard in answer to them.

PATTESON, J.—As a general rule, the affidavits of jurymen cannot be received to support or impugn their verdict; but, in the present instance, it is sought to use them in answer to affidavits imputing gross misconduct to them; and, I think, that every principle of natural justice demands that they should be heard to repel the imputations thus cast on them. With respect to the other objection, it is true that the affidavits which are used in support of the rule have been already read at Chambers; but the present rule is drawn up on reading them, and, I therefore think the opposite party may use affidavits in shewing cause.

The rule was afterwards made absolute, on the ground of the verdict being against evidence.

Rule absolute.

(a) 4 Dowl. 658.

(b) 7 Dowl. 223; See S. C. 4 M. & W. 721.

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SHARPE v. CUMMINGS.

Assumpsit for money paid for the use of the defendant. It appeared at the trial, that the plaintiff and the defendant had jointly taken the estate of some pasture land, and had put on it their respective cattle: but there was no proof in what proportion each was to contribute to the payment of the rent, nor of how many cattle each might, or had, put on the land. The plaintiff brought his action for the moiety of the rent which he had paid; and the jury having returned a verdict for the sum claimed: *Held*, there was no evidence to warrant them in finding a verdict for the moiety. *Quære*, if these facts shewed a partnership between the parties?

THIS was an action for goods sold and delivered, and for money paid, and on an account stated. To which the defendant had pleaded the general issue.

At the trial, before the undersheriff of Monmouthshire, it appeared that the action was brought to recover 15s., the price of some timber; and 5*l*. for money paid for the use of the defendant. With respect to the timber, that portion of the claim was clearly proved. The 5*l*. for money paid for the defendant was claimed as the defendant's moiety of a sum of 10*l*. which the plaintiff had paid as rent for certain pastures, which the plaintiff and defendant had jointly taken, and on which they had put their separate cattle. It appeared from the evidence of the landlord, a Mr. Wakeman, that as far as he recollected, the plaintiff was alone when he took the land, and that he understood that the plaintiff took it for himself and defendant, and that they were partners. He also proved that he had afterwards received the rent of 10*l*. from the plaintiff. A servant of Mr. Wakeman was called, who proved that he had seen the cattle of both upon the ground, and that he had met the defendant on the ground, who told him that he and the plaintiff had taken it between them; and that he had seen defendant's bailiff attending to the cattle. He also stated that he had seen both the plaintiff and the defendant on the ground; but that he could not say who had the most cattle there. There was no evidence of any other partnership dealing between them. It was then objected, on the part of the defendant, that the plaintiff could not recover on this evidence, as this was a partnership transaction, and there was no proof that any account had been taken between them, or any balance struck. The undersheriff, however, left the case to the jury, reserving to the defendant leave to move to enter a nonsuit (*a*). The jury accordingly found

(*a*) It was admitted that this least proof as to the 15s. for the was incorrect, as there was at timber.

a verdict for 5*l.* 15*s.* A rule nisi being obtained to reduce the damages, or for a new trial ;

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Wallinger shewed cause. This is not the common case of partnership, where the plaintiff cannot recover unless he prove an account taken and a balance ascertained. Here there is strictly no evidence of partnership. The only evidence is, that the plaintiff and the defendant had jointly taken the land ; and the landlord says, he understood that they were partners, but not from whom he received that information. The rest of the evidence merely confirms the joint taking, and shews a joint user. A mere joint interest in property will not constitute a partnership ; *Helme v. Smith* (a). There it was held, that a part-owner of a vessel, who, as ship's husband, incurs the expense of the outfits, may sue the other part-owners separately for their respective shares of the expense. The plaintiff, being jointly liable with the defendant for the rent, was not bound to wait till he was sued for it ; but might pay the whole, and bring an action against the defendant for his share ; *Pitt v. Purssord* (b). In a partnership there must be a participation in the profit and loss ; but there was no proof of any such agreement between the parties in this instance. But even were the present a case of partnership, the plaintiff would still be entitled to recover ; as here the action is for the defendant's contribution to the capital, *Venning v. Leckie* (c) ; and, although the payment was made after the venture began, that can make no difference, as it was in pursuance of a liability created before the partnership (if there were any) commenced. There was no objection made at the trial, on the ground of the amount of the defendant's share not being proved ; nor was there any leave reserved on that point. The case of *Peacock v. Peacock* (d), which will be cited on the other side, was, where a partnership

(a) 7 Bing. 709 ; See S. C.
 5 M. & P. 744.
 (b) 8 M. & W. 538.

(c) 13 East, 7.
 (d) 2 Campb. 45.

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was admitted to exist between the parties, and the amount of their respective shares purposely left open.

Allen, in support of the rule. The fair and ordinary presumption from the facts of this case is, that here there was a participation of profit and loss, and, consequently, a partnership. The case of *Peacock v. Peacock* (a) shews, that where parties are partners quoad the world, they are to be taken to be partners inter se; and it also shews that no presumption arises from the fact of being partners as to the amount of their respective shares. Here there was no evidence to shew that the plaintiff and defendant had occupied equally. [*Patteson, J.*—If this were the case of a joint purchase, could the action be maintained?] Perhaps it might, if the purchase were with a view to, and as a foundation of, a future partnership; but here the payment is made after the venture is over and finished. [*Patteson, J.*—There is a case of *Hesketh v. Blanchard* (b) which preceded *Venning v. Leckie* (c); but it may be said, that there also the transaction in dispute preceded the foundation of the alleged partnership.] That, too, was a case of a mere loan of credit. In *Venning v. Leckie*, the venture was not over.

Cur. adv. vult.

PATTESON, J.—As the plaintiff will not consent to the reduction of the damages, I think there must be a new trial; as there was no evidence to justify the jury in finding a verdict for the moiety of the rent paid. All that appears is, that they took the land jointly; but whether they were jointly to occupy, what each party was to pay, whether a half, or only a third, or even less, is left quite in doubt. I therefore see no evidence on which the jury could find a verdict for the moiety. I think there is some doubt about this being a partnership. If they had taken a farm to-

(a) 2 Campb. 45.

(b) 4 East, 144.

(c) 13 East, 7.

gether, no doubt there would then have been a partnership, as there must then have been profit and loss. But, in the case of eatage of grass land, where each was to put on his separate cattle, I do not very well see how profit and loss could arise. The present case does not come within the rule in *Venning v. Leckie* (a), for here the payment was made not before, but in consequence of the alleged partnership.

Rule absolute for a new trial.

(a) 13 East, 7.

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WALKER v. DE RICHEMENT.

(In the full Court.)

HINDMARCH had obtained a rule (a), calling on the plaintiff to shew cause why the defendant should not be discharged out of custody, on the ground that having been a prisoner at the time of judgment being signed against him, the plaintiff had suffered more than two Terms to elapse without charging him in execution. It appeared, that on the 3d of February in the present year, the defendant had been arrested under a capias issued against him by order of a Judge, under the 1 & 2 Vict. c. 110, s. 3, on an affidavit of his being about to quit England; and that in the following month, the plaintiff had signed judgment against him for want of a plea. The plaintiff, however, had not carried in the roll, or proceeded to tax his costs, till after Easter Term; nor had he, up to the present time, taken any steps to charge the defendant in execution. The defendant had thereupon made two several applications for his discharge from custody to a Judge at Chambers, who had declined to interfere, in consequence; it was said, of a

Where the plaintiff had signed judgment for want of a plea against the defendant, who was in custody on a writ of capias, issued under the 1 & 2 Vict. c. 110, s. 3: Held, that this was a final judgment within the meaning of Reg. Gen., H. T. 2 Wm. 4, r. 85, notwithstanding that the plaintiff had not carried in the roll, or proceeded to tax his costs; and that the plaintiff was therefore bound to charge the defendant in execution

(a) Before Mr. J. Patteson, in the Bail Court.

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decision in this Court of *Ireland v. Berry* (a), but had referred the parties to the Court.

Lush shewed cause. This application is under the 86th rule of Hil. Term, 2 Wm. 4, which, after ordering that the plaintiff shall proceed to trial or "final judgment" against a prisoner within three Terms after declaration, also provides that the plaintiff "shall cause the defendant to be charged in execution within two Terms inclusive after such trial or judgment; of which the Term in or after which the trial was had shall be reckoned one." This rule, however, it is submitted, does not apply to the present case, where the lapse of two Terms has not taken place since the signing of final judgment. Final judgment is only to be taken to be pronounced from the time that the costs are taxed, and the Master's allocatur thereon given; *Butler v. Bulkeley* (b), *Salter v. Slade* (c), *Peirce v. Derry* (d). The case of *Colbron v. Hall* (e) may seem against the view here taken. It does not however distinctly appear in that case, but that the plaintiff had taxed his costs; and if so, it is no authority on the present point. Besides, a custody under a writ of capias under the 1 & 2 Vict. c. 110, s. 3, is not a custody contemplated by the rule of Hil. Term, 2 Wm. 4, r. 85, which only applies to a custody under a species of arrest which is now abolished. This may be collected from the decision to which this Court came in the late case of *Ireland v. Berry* (f). There this Court held, that the rule of Trin. Term, 3 Wm. 4, r. 1, which applies to custody under similar process, does not affect a party in custody under a capias issued under the 1 & 2 Vict. c. 110, s. 3; but that the latter is a proceeding entirely collateral to the action. *Brown v. M'Millan* (g), and *The Queen v. The*

(a) *Ante*, vol. 1, p. 866.

(b) 1 Bing. 233; See S. C. 8 Moore, 104.

(c) 3 N. & M. 717; See S. C. 1 A. & E. 608.

(d) 3 G. & D. 477; See S. C.

4 Q. B. 635.

(e) 5 Dowl. 534.

(f) *Ante*, vol. 1, p. 866.

(g) 7 M. & W. 196; See S. C. 8 Dowl. 852.

Sheriff of Montgomeryshire (a), are also authorities that the writ of *capias* under the 1 & 2 Vict. c. 110, s. 3, is a collateral proceeding.

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Hindmarch, in support of the rule, was not called upon.

LORD DENMAN, C. J. (His Lordship read the rule of Hil. Term, 2 Wm. 4, r. 85.)—It seems to me that this judgment is within the meaning of that rule: and that the late decisions do not affect the present case.

PATTESON, J.—It is clear that there was so far a final judgment in the present case, that the defendant could not have pleaded; and the plaintiff is not to be permitted by delaying to tax his costs, to say that there is no final judgment, and so detain the defendant in custody. It appears to me that it forms no answer to the present rule merely to say that this writ of *capias* is now a collateral proceeding. It may be that it is so, because the statute 1 & 2 Vict. c. 110, s. 2, says, that all personal actions shall be commenced by writ of summons; and section 5 enacts, that a defendant not previously served with a copy of a writ of summons may be served in custody; thus manifestly shewing that a *capias* is not a process in the action. But what is the writ of *capias* for? The 4th section of the statute says, that the defendant shall remain in custody until he gives a bail bond or makes a deposit, according to the practice of the Court, with a view to putting in bail above. And for what purpose is he to put in bail above? In order to answer the judgment. As soon, therefore, as judgment is signed, matters are put in the same state with reference to the practice of the Court as they were before.

WILLIAMS, J., and COLERIDGE, J., concurred.

Rule absolute.

(a) 1 Dowl. 388, N. S.; See S. C. 9 M. & W. 448.

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REGINA v. The RECORDER of BOLTON.

A party having been convicted before two justices under the 17 Geo. 3, c. 56, s. 8, entered into a recognizance, and gave notice of appeal to the quarter sessions, under sect. 20. He afterwards abandoned his notice of appeal. At the sessions, the respondents applied to be permitted to enter the appeal; and also to have their costs allowed them which had been incurred by the appellant's not giving the usual notice of abandonment required by the rules of the sessions: *Held*, on motion for a mandamus, that the recorder had acted properly in refusing both these applications.

Semble, that where a party had been convicted under the above statute, and having entered into a recognizance to appeal, had not been imprisoned, but afterwards had abandoned

THIS was a rule obtained by *Cowling*, calling on the Recorder of Bolton, in Lancashire, to shew cause why a writ of mandamus should not issue directed to him, commanding him to enter, or to cause, or allow to be entered, as of the last general quarter sessions of the peace, held in and for the said borough, an appeal, or the matter of an appeal of William Barlow, against the conviction of him, the said W. B., by two of the keepers of the peace and justices in and for the said borough, on the 15th day of July last, for wilfully neglecting the working up of certain materials in the cotton manufacture contrary to the statute, &c., with continuances thereon, to the next general quarter sessions of the peace, to be held in and for the said borough, and at such next general quarter sessions of the peace, to proceed to hear and determine the matter of the said appeal, or to affirm the said conviction, or award such costs to be paid by the said W. B. as might appear to be reasonable.

It appeared from the affidavit in support of the rule, that one William Barlow, a counterpane weaver, had been convicted before two justices of the peace of the borough of Bolton, on the 15th of July last, for an offence under the 17 Geo. 3, c. 56, s. 8, in having, whilst employed by Messrs. Lomax, his masters, to work up certain materials in the cotton manufacture, wilfully neglected, for the space of eight days successively, to work up the same; and that he had been adjudged to be imprisoned in the House of Correction, and there kept to hard labour, for one month. Barlow had thereupon given notice of appeal to the next quarter sessions, under sect. 20; and had entered into the recognizance required by that section; upon which he was immediately discharged out of custody, and, consequently,

his appeal, the magistrates might proceed to enforce the original conviction against him.

without having undergone any part of the sentence of the magistrates. The conviction was duly drawn up and returned under the hands and seals of the justices to the clerk of the peace. The next quarter sessions for the borough were holden on the 24th of October following; but on the 22nd, Barlow had served a notice of abandonment of appeal upon the attorney of the prosecutors. By one of the rules of practice at the sessions, all notices of abandoning appeals were to be given three days before the sessions, exclusive of the day of giving the notice, and of the first day of the sessions; so that the above notice, if within the operation of the rules, was clearly too late. By another rule, the appeals were to be entered with the clerk of the peace at the sitting of the Court, on the first morning of the sessions; and "all applications for costs on any appeal were to be made immediately after the hearing of such appeal." The prosecutors had prepared their case, and instructed counsel before they received the notice of abandonment; and they therefore went to the sessions, primarily to get the above conviction affirmed; and, secondarily, to obtain their costs on not proceeding to trial of the appeal. With this view, on the morning of the 24th, when the sessions were held, they applied to be allowed to enter the appeal, offering to prove the notice of appeal, and the entering into recognizance. To this the counsel, who appeared for the appellant, objected; admitting both these facts, but denying the right of the sessions to entertain the appeal, after the notice of the abandonment, on the part of the appellant. The learned recorder took the same view, and refused to permit the appeal to be entered by the respondents, or to confirm the original order, or to give the respondents their costs consequent on the informal notice of abandonment. It appeared that application had been afterwards made to the original magistrates for a warrant to apprehend and commit Barlow, which they had refused to grant, conceiving, on the authority of *Rex v. Twyford and*

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Another (a), that their jurisdiction had been taken away by the notice of appeal.

Baines, on the part of the recorder, shewed cause. The recorder conceived he had no jurisdiction to hear this appeal. An appeal is in the nature of a personal remedy. Here the course that the respondents should have adopted was plain: they should have applied to estreat the recognizances, for the default here was in a matter before the quarter sessions, and over which that Court had therefore jurisdiction, *Regina v. Justices of the West Riding (b)*, *Haynes v. Hayton (c)*. The original judgment would then have stood as unappealed against, and liable to be enforced. An appeal cannot be entered by the respondents, *Regina v. Justices of West Riding (d)*. [*Patteson, J.*—*Mr. Cowling* did not put it on the jurisdiction of the sessions generally; but rather on the particular words of this act.] The appeal clause in the present act is contained in sect. 20. It enacts, that the party against whom the order shall be made, may appeal to the next quarter sessions, and shall thereupon enter into recognizances to appear, in default of which he is to be committed to prison; “and the justices at such sessions are hereby authorized and required, upon due proof made of such notice of appeal, either by the acknowledgment of the justices to whom the same shall have been given, or otherwise, to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable, to be paid by either party.” These words are very similar to those used in the 17 Geo. 2, c. 38, s. 4, giving an appeal against poor’s rates. There it is enacted, that the party may appeal to the next quarter sessions; “and the justices of the peace there assembled, are hereby authorized and required to receive such appeal,

(a) 5 A. & E. 430; See S. C.
 6 N. & M. 836.
 (b) 7 A. & E. 583; See S. C.

2 N. & P. 457.
 (c) 7 B. & C. 243.
 (d) 3 G. & D. 170.

and to hear and finally determine the same, &c.: and the said justices may award and order to the party, for whom such appeal shall be determined, reasonable costs, &c." But it was never thought that the respondent in an appeal against a poor's rate, might enter the appeal for the purpose of having it quashed, and obtaining his costs. The words in the clause now under consideration are obviously introduced for the purpose of enabling the sessions to dispense with the proof of the recognizances having been entered into. The 49 Geo. 3, c. 68, was the act relating to bastardy orders, before the Poor Law Amendment Act, and by sect. 5, which gives the right to appeal, it is enacted, that the party against whom the order is made may, upon entering into a recognizance, appeal to the quarter sessions; and that the justices, "at their said sessions, upon proof of such notice being given, and of entering into such recognizance as aforesaid, shall, and they are hereby required to proceed in, hear, and determine the causes and matters of all such appeals, and shall give such relief and costs to the parties appealing, or appealed against, as they in their discretion shall judge proper." These words are equally large with those of the act in question; and yet it has never been held, that the respondents in a bastardy appeal might enter the order, for the purpose of confirming it; and it has been decided that the sessions could not, in such a case, give costs; *Rex v. Justices of Essex (a)*. If, indeed, the sessions had had the power to award costs in such a case, the Legislature would never have thought it necessary to have passed the act of 8 & 9 Wm. 3, c. 30; by sect. 3 of which the quarter sessions are enabled, in cases of appeals against the removal of paupers, to give costs to the respondents, although the appellants refuse to proceed with the appeal. It would be obviously quite unnecessary to take recognizances, if they could enter the appeal without the appellant's consent; but this is done in order to compel

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(a) 8 T. R. 583.

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him to proceed, or else to forfeit his recognizances. The costs in this case are ancillary to the appeal, and, if the sessions had no right to hear the appeal, they had no right to give costs, unless under a special provision, like the 3rd sect. of the 8 & 9 Wm. 3, c. 30; *Regina v. Inhabitants of Stoke Bliss* (a). With respect to the case of *Rex v. Twyford* (b), the decision there mainly proceeded on the ground, that as the party had been committed to gaol for want of finding recognizance, and as the statute left it doubtful whether the term for which he had been so imprisoned was to be reckoned as part of the period of his punishment, the Court would not subject the magistrates to an action of false imprisonment, by compelling them by mandamus to act in the matter; but it seems to have been conceded on the argument there, that if there had been no question as to part of the punishment having been inflicted, the original justices might have entertained the complaint again. Mr. Justice *Littledale* there says (c), "Then have the convicting justices power to act upon their conviction? They have not, unless what has passed since the conviction amount to nothing." The return of the conviction could not of itself give the sessions jurisdiction; for whether there had been an appeal or not, the return must have equally been made. The stat. 1 & 2 Vict. c. 38, which is an amendment of the Vagrant Act, expressly gives the power to sessions in a case like the present, where an appeal is given but not proceeded with; which shews that the law is otherwise without special enactment. But there is another and a fatal objection to the present application. The late act of 6 & 7 Vict. c. 40, has repealed, amongst others, the act of 17 Geo. 3, c. 56, so far as relates to the trades and manufactures enumerated in the first section, and which seems to embrace the present case; and, if this conviction is to be treated as a conviction under the recent

(a) 1 Dav. & Mer. 135.

(b) 5 A. & E. 430.

(c) 5 A. & E. 435.

act, then the appeal must be regulated by the 29th sect., which only gives the power of appeal where the imprisonment exceeds one calendar month, which is not the case in the present instance. [*Patteson, J.*—Is it contended that the former act is wholly repealed? If not, does this offence necessarily come within the recent act?] The former act is not entirely repealed; but for aught that appears on the face of the warrant, it may be under the recent act. [*Patteson, J.*—I must take it for granted that it is not; otherwise the Justices would not have suffered the defendant to enter into recognizances.]

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Cowling, in support of the rule. It is submitted that the recorder had power to “hear and determine the matter of the appeal;” and, if the practice of the sessions required it, to make the necessary entry of the appeal. This application is by no means an anomalous one; for the power to hear the appeal is given by express words in the case of vagrancy orders by the stat. 1 & 2 Vict. c. 38, which has been referred to; and, in the present case also, it is submitted, that it is given by express words. It has been argued as if sect. 20 was the only section applying to the present case; but sect. 22 has also a very decided application. By that section it is enacted, that “in case the person or persons so convicted shall appeal from the judgment of the said justices to the said general or general quarter sessions, the justices on such general or general quarter sessions are hereby required, upon receiving the said conviction, drawn up in the form aforesaid, to proceed to the hearing and determination of the matter of the said appeal, according to the direction of the said act, any law or usage to the contrary notwithstanding.” Taking both of these sections together, therefore, it may be collected that the meaning of the Legislature was, that after the magistrates had received notice of appeal, and the recognizance had been entered into, and the conviction forwarded to the sessions, that their authority should entirely cease; and the sessions

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be then bound to go on to determine the matter of the appeal. Besides, sect. 20 refers to the 22 Geo. 2, c. 27, and extends the appeal in cases under that act; and, on referring to the appeal clause in that act, which is sect. 6, we find express power given to the sessions to go on to award costs, if the appellant does not prosecute his appeal; and, if so, the same power is imported into this act.

[*Baines*. There are two appeal clauses in that act, the one in sect. 3, where no recognizances are required to be entered into; and the other in sect. 6, which latter section only applies to cases of removing goods.]

Cowling. By sect. 22 of the principal act, all appeals under 22 Geo. 2, c. 27, are included. The language of the principal act is as clear as that of the 8 & 9 Wm. 3, c. 30. It was admitted in the case of *Regina v. Inhabitants of Stoke Bliss* (a), that the party might have had costs if they had not been ancillary. Here we do not ask for them as ancillary. The act of 6 & 7 Vict. c. 40, was not referred to at the sessions; and it is sufficient if we have an act of Parliament in our favour. It is for the other side to shew affirmatively that it has been repealed. At any rate, the Court, even if it entertains a doubt, will grant the application, as the matter will be more properly argued on the return to a writ of mandamus.

Cur. adv. vult.

PATTESON, J.—This was an application for a mandamus to the recorder of Bolton, requiring him to hear the subject matter of an appeal against a conviction of one William Barlow, or, at all events, to give the respondents the costs of the appeal. The conviction was under the 17 Geo. 3, c. 56, and the language of that act has no doubt created considerable difficulty. It appears that the party was convicted before two magistrates, and had given them a notice

(a) 1 Dav. & Mer. 135.

of his intention to appeal, and had entered into a recognizance to try the appeal, under sect. 20. In consequence of this, he was not imprisoned under the succeeding portion of the same section, which enables the magistrates to send the party to prison if he fail to enter into the proper recognizance. It was under that part of the act that the case of *Rex v. Twyford* (a) was decided; and that case, therefore, widely differs from the present, as the party there had been sent to prison.

In the present case, however, the party after having given his notice of appeal, and entered into the proper recognizance, countermanded that notice; and it is then said that the respondents were entitled, nevertheless, to enter the appeal, and proceed with it, for the purpose of getting the conviction affirmed. This Court has, however, said, on several occasions, that it knows of no power on the part of the respondents to enter an appeal. Mr. *Cowling* did not deny that this was the general rule, but contended that under this act of Parliament, such a power was expressly conferred by the latter part of the 20th section, which enacts, that "the justices at such sessions are hereby authorized and required, upon due proof made of such notice of appeal, &c., to hear and determine the matter of the said appeal, and to award such costs as to them shall appear just and reasonable, to be paid by either party," &c.

These words, however, are to be found in other statutes. They are not, indeed, in the 17 Geo. 2, c. 38, which gives a power of appeal against poor's rates; but they are to be found in the 49 Geo. 3, c. 68, s. 5, which gives the power of appeal against orders in bastardy, and in several other statutes, into which I have looked. If, therefore, I were to hold in the present instance that these words confer the power on the sessions, which it is contended they do, the same construction must also be put on various other acts; but for this no authority has been cited. It seems to me

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impossible to contend that the act of Parliament meant, that where the party who gave notice of the appeal did not enter it, the sessions should, nevertheless, have jurisdiction to hear and determine it. What is meant by the words "upon due proof made of such notice of appeal" is, that the appellant must satisfy the sessions of such notice having been given before they can proceed to hear it; but a prior step must be taken to enter it, and make it a matter cognizable by them. I think, therefore, that it is not possible to construe the act of Parliament in any other way than to say, that where notice of appeal is given, and the appeal is entered, then the sessions may proceed to hear and determine the appeal, but not otherwise. This appeal was not so entered, and therefore, I think, that the recorder was right in refusing to hear it.

It is said that great inconvenience may arise from a construction contrary to the one contended for; and that there is no other remedy against the party, who may thus escape all punishment. But that is not so, for the appellant's recognizances may be estreated. It is also said, that it is not clear in such a case that the original conviction can be proceeded upon by the magistrates. I should say, however, that where a party gives a recognizance to appeal, and thereupon is not imprisoned, and afterwards neglects to enter his appeal, the not entering the appeal, according to the recognizance, comes to the same thing as if there had been no notice of appeal at all; and that the magistrates might proceed the same as if no such notice of appeal had ever been given. The difficulty in *Rex v. Twyford* (a) arose entirely upon whether the imprisonment which the party had undergone had been an imprisonment for punishment, or merely for custody; and the Court only refused to grant a mandamus, because they would not force the magistrates to proceed in a doubtful case, and so subject them to an action for false imprisonment.

(a) 5 A. & E. 430.

Mr. *Cowling* then contends, that at least the applicants are entitled to a mandamus for the costs; for the act says that the sessions shall have power "to award such costs as to them shall appear just and reasonable to be paid by either party." It is clear, however, that these costs are merely ancillary to the appeal; for the act says, that the justices shall hear the appeal before it empowers them to award costs; and no express power is given to award costs where the appeal is not followed up. The stat. 8 & 9 Wm. 3, c. 30, has been referred to, but there the power is expressly given. That act is entirely confined to cases of settlement, and therefore cannot apply to the present case. A case has been cited of *The Queen v. Inhabitants of Stoke Bliss* (a), and there, although the sessions had the express power given to them under the above act; yet, as on the face of their order awarding costs, they had confirmed the appeal, which they had no power to do, this Court held, that looking only to the order itself, they must hold that the costs were ancillary to the confirming the appeal, and, as the sessions had no right to do the latter, the order failed entirely. I only mention this, that there may be no mistake as to the grounds on which that case was decided; for it does not apply to the present case.

It seems to me, therefore, that the recorder has acted perfectly right in refusing either to hear the appeal or to give costs. The present rule must, therefore, be discharged, and, as against a public officer like the recorder, with costs.

Rule discharged, with costs.

(a) 1 Dav. & Mer. 135.

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BROWN v. EDWARDS.

The affidavits on a motion to discharge a party out of custody, against whom an attachment has issued in a cause, should be entitled, The Queen against the person attached, in the original cause; and not in the original cause simply.

A RULE had been obtained to discharge an attorney of the name of Weston, out of custody, who had been taken under an attachment for not delivering a bill of costs in the above cause, pursuant to an order of the Court.

Platt shewed cause, and took a preliminary objection, that the affidavit in support of this motion was not properly entitled in the cause of "*Brown v. Edwards.*" An attachment having issued, and the party being in custody, this was no longer a proceeding in the cause, but a separate criminal proceeding. The affidavit should have been entitled, "*Regina v. Weston*, in the cause of *Brown v. Edwards.*"

Crowder appeared in support of the rule.

PATTESON, J.—After an attachment has once issued, the proceedings to discharge the party should be entitled in the form suggested. The motion is one on the Crown side of the Court. The rule must, consequently, be discharged.

Rule discharged.

SCOTT v. ENGLAND.

A purchaser at an auction can, before payment, make a complete bargain and sale of the article which he has bought, to a third party; so as to maintain an action for goods bargained and sold.

THIS was an action of debt. The declaration was for the price and value of a surface plate, bargained and sold by plaintiff to defendant, for money paid, and on an account stated; to which the defendant pleaded, *nunquam indebtedatus*.

The cause was tried before one of the Secondaries of London, and the plaintiff obtained a verdict. At the trial, it was proved that the plaintiff and the defendant were at

an auction together, and that the article in question, for which this action was brought, was knocked down to the plaintiff; that after the purchase, the defendant applied to the plaintiff to sell him the lot, and the plaintiff agreed that he should have it at the same price at which it had been knocked down to the plaintiff. The defendant then agreed that he would next day pay for the lot, and take it away. At the time that this bargain was struck, the plaintiff had not paid the auctioneer, nor had any arrangement of any kind been made about the payment. By the conditions of sale, no article was to be removed before payment of the purchaser's account of all his lots. The defendant did not remove the article, and it appeared upon the evidence, that it had been subsequently seen in the possession of the plaintiff.

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A rule having been obtained for a nonsuit or a new trial, on the ground that an action for goods bargained and sold could not, under the above circumstances, be maintained.

Lush shewed cause. It may be admitted that an action for goods bargained and sold, can only be maintained where the property passes to the vendee by force of the contract. The defendant, however, contends, that a bargain and sale cannot be perfected, unless the seller has such a complete dominion over the property that no other person has a lien. But if that were so, it would avoid the ordinary contracts which are made by merchants respecting goods in the docks and public warehouses; in all which cases there are charges for which a lien exists. The law on this subject clearly is, that where there is a specific chattel, it passes by the contract of sale, and that if afterwards it be destroyed by fire, it is the purchaser's, and not the seller's loss; *Hinde v. Whitehouse* (a). No delivery here was necessary from the auctioneer to the plaintiff to perfect his title. In

(a) 7 East, 558; See S. C. 3 Smith, 528.

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Dixon v. Yates (a), *Parke, J.*, states the law thus, "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery." It, therefore, can make no difference that the plaintiff had not paid the auctioneer at the time of his contract with the defendant. The property passed, and this action is, therefore, maintainable.

Udall, in support of the rule. The argument is not that no action can be brought; but that the present cannot be maintained. The defendant does not deny that the property in a specific chattel passes by a contract of sale; what he contends for is, that it does not pass unless the seller is himself the owner. The case of *Hinde v. Whitehouse (b)*, is quite distinguishable; for in that case, by the express terms of the contract, the goods were to remain at the risk of the buyer. It is assumed by the other side, as universally true, that this action can be maintained, because the property passed; that is not so. In *Simmons v. Swift (c)*, *Littledale, J.*, in considering a similar argument, says, "I think further, that an action for goods bargained and sold would not lie merely because the property passed." Denying, therefore, this to be the test, the defendant contends, in the first place, that the property was not in the plaintiff at the time of the contract. By the conditions of sale, the payment to the auctioneer was to precede the delivery of the lot. The case then comes within the exception to the general rule as to the sale of specific chattels, as decided in *Tempest v. Fitzgerald (d)*. That case arose out of the Statute of Frauds. It was an action for the price of a horse, which had died whilst in the seller's custody. By the contract, payment was to be concurrent with, or precede the delivery. After the contract, de-

(a) 5 B. & Ad. 340; See S. C.
2 N. & M. 177.

(b) 7 East, 558; See S. C.
3 Smith, 528.

(c) 5 B. & C. 865; See S. C.
8 D. & R. 693.

(d) 3 B. & A. 680.

fendant rode the horse, and gave directions as to his treatment, &c. The jury, on being asked, found that these were acts of ownership, and the learned Judge held, that if so, there had been a sufficient acceptance to take the case out of the statute; but this Court afterwards directed a nonsuit to be entered, for as the payment was to precede the delivery, no right of property passed until payment; and, therefore, the acts found to be so by the jury, could not be acts of ownership. So, in the case now before the Court, as the payment was to precede delivery, no act of ownership could be operative before payment; especially that very important one, of the sale of the chattel. But further, if the property did pass to the plaintiff, still this action will not lie; for it is submitted, that the test is not whether the property passed, but whether the property and *the right to the possession* vested. It is the universal rule as to chattels, that he that has not the complete property in himself cannot transfer such right to another. The vendee cannot be in a better situation than the vendor. *Dixon v. Yates*, instead of being in favour of the plaintiff, will be found to be in favour of defendant. Mr. Justice *Littledale* there says (a), "It is a general principle of law, that a man who has not the property and right of possession in goods cannot transfer them to a vendee." Had then the plaintiff at the time of this contract, the right of possession? He had not, because payment by the purchaser is the condition on which such right is obtained. This was fully considered in the case of *Bloxam v. Sanders* (b), where *Bayley, J.*, in delivering judgment, says, "payment, or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession." Supposing the defendant at the time of the contract had paid the price, he could not have immediately taken the goods away; or if he had done so, he

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(a) 5 B. & Ad. 339; See S. C.
2 N. & M. 177.

(b) 4 B. & C. 948; See S. C.
7 D. & R. 396.

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would have been liable in trover to the auctioneer. If this action will lie, the plaintiff will get the price of the goods, although he may have never been in a condition to deliver; for if the action is now maintainable, it was equally so immediately after the contract, as no subsequent assent to the contract was given. The reason that this action cannot be maintained on a contract for making an article not in esse at the time, is because the subject of the contract cannot then be appropriated or delivered; so here, this, although a specific chattel, could not be delivered by the plaintiff, or appropriated by him, because it was not *his* to deliver or appropriate. It is, therefore, submitted, that the plaintiff not having the property in him at the time of the contract, or if having the property, not having the right of possession, both of which must concur to make a complete bargain and sale, this action cannot be maintained.

Cur. adv. vult.

PATTESON, J.—I am of opinion that this rule must be discharged. All that is necessary to enable a party to maintain an action for goods bargained and sold is, that the property in the specific goods should have passed. In the case of *Athinson v. Bell* (a), which has been cited, the property had never passed, as the plaintiff might have delivered the machines to any third person; in *Simmons v. Swift* (b), the bark had never been weighed; and in *Dixon v. Yates* (c), the original vendor never intended to part with the property. In the present case, there is no doubt that an action would have lain against the present plaintiff at the suit of the original vendor, and that the property became vested in him. That property, by his bargain with the defendant, vested in the defendant; and he may,

(a) 8 B. & C. 277; See S. C. 8 D. & R. 693.

2 M. & R. 292.

(c) 5 B. & Ad. 313; See S. C.

(b) 5 B. & C. 857; See S. C. 2 N. & M. 177.

therefore, maintain the same action against the defendant, as he would have been liable to at the suit of the original vendor. The rule will, therefore, be discharged.

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Rule discharged.

KEANE v. WHITE.

IN this case, a writ of capias had been sued out in the Palace Court to answer the above named plaintiff, "of a plea of trespass on the case;" and the defendant, had removed the cause into this Court by a writ of habeas corpus cum causâ. The plaintiff thereupon obtained a Judge's order for a procedendo to issue, unless bail were given by the defendant. The defendant, in pursuance of the order, accordingly put in bail; and the plaintiff afterwards served him with a copy of a declaration in this Court in the following form:—

"In the Queen's Bench.

The 2nd day of November, 1844.

Middlesex, } Daniel Keane, the plaintiff in this suit, in
to wit. } person, complains of Frederick J. White, the
defendant in this suit, who has been summoned to answer
the plaintiff in an action on promises," &c.

The declaration contained only one count, which was on a bill of exchange drawn by the plaintiff on, and accepted by, the defendant. A rule nisi had been obtained to set aside the declaration for irregularity on the following grounds: first, that it did not state the defendant to be "in the custody of the Marshal of the Marshalsea;" secondly, that it stated the defendant to have been "summoned," which was not the fact; thirdly, that the recital of the writ in the declaration, "on promises," varied from the writ

Where a writ of capias had been sued out in the Palace Court, in "a plea of trespass on the case," and the defendant removed the cause into this Court by a habeas corpus, &c., and the plaintiff delivered a declaration in this Court in the ordinary form, stating that the defendant, (without alleging him to be in the custody of the marshal, &c.,) had been "summoned" to answer the plaintiff "in an action on promises:"
Held, that the declaration was irregular, in stating the defendant to have been "summoned," and must therefore be amended.

Semble, that the variance in the statement of the cause of action was immaterial.

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itself, which was “of a plea of trespass on the case;” and lastly, that the declaration was entitled of the day and year, and not of a Term.

Keane shewed cause. With respect to the first objection, the case of *Dod v. Grant* (a), is relied on by the other side as an authority that the declaration is irregular. There the declaration having stated the defendant to be in the custody of the Marshal of the Marshalsea, was demurred to on the ground that the plaintiff had not followed the rules prescribed by the Court with regard to the commencements of declarations, and the Court held, that the statute 2 Wm. 4, c. 39, and the rules of M. T., 3 Wm. 4, did not apply to a cause commenced in the Palace Court, and removed into this Court. But the question there came before the Court on a special demurrer; and the Court seemed to intimate, that this decision proceeded in some measure, on the ground that the objection ought to be made, if at all, by motion to set aside the declaration for irregularity. Besides, that case was decided before the 1 & 2 Vict. c. 110, by which arrest on mesne process is abolished; and before the 5 & 6 Vict. c. 22, which does away with the office of the Marshal of the Marshalsea. It would now be clearly bad to describe the defendant to be in custody, when arrest on mesne process is expressly forbidden by statute, and in the custody, too, of an officer who no longer exists. It may be said, that the allegation of custody never could have been in the earlier times true; but that is not so, for by the statutes cited in 3 *Black. Com.* p. 281, a *capias* was allowed to arrest the person in certain actions, as long ago as the reign of Henry the Third. This objection is no doubt originated by a passage in *Tidd's Practice*, p. 412, 3, 9th ed., that where a cause is removed from the inferior Court by writ of habeas corpus, &c., “the

(a) 4 A. & E. 485; See S. C. 6 N. & M. 70.

plaintiff must declare against the defendant as in custody of the Marshal." But that must be taken to mean, that he should be stated to be in the custody of the Marshal, or other officer, as the fact really is; *Tidd's Practice*, p. 432, 9th ed. In the present instance, he is stated to be summoned, and that is really the case; for the only effect of the writ of *capias* is as a summons or warning to the defendant. [*Patteson, J.*—If the defendant's argument be correct, the declaration should commence with the old form, "Be it remembered," &c., and proceed to recite, that "a bill has been exhibited," &c., although no bill can now be brought. The difficulty I find is, that this declaration states the defendant to have been summoned, which he has not been.] It is submitted, that in point of fact he has been summoned; for the only effect of the *capias* since the abolition of arrest on mesne process, in such a case, must be that of a summons; at all events, it was impossible for the plaintiff to have declared in the form suggested, since the 5 & 6 Vict. c. 22. With respect to the other objection, that there is a variance between the writ and the declaration in describing the form of action, that is not so; for the action on promises is only one of the various forms of an action of trespass on the case. But even were it otherwise, *Gunn v. Mackhenry* (a), and *Bowerbank v. Walker* (b), are authorities to shew that where the cause is removed from the inferior Court by habeas, there is no objection to the plaintiff's declaring in a different form of action from that which he commenced in the Court below; provided it be for the same cause of action, and not for a larger amount. The only effect formerly of a variance was, that the bail were discharged; *Tidd's Practice*, p. 450, 9th ed. It did not render the declaration irregular.

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Humfrey, in support of the rule. The declaration in this case is neither according to the old form, nor according

(a) 1 Wils. 277.

(b) 2 Chit. Rep. 517.

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to the fact. The defendant has never been "summoned" to answer the plaintiff; and it is as much a fiction to treat him as if he had been, as it would be to describe him as "in the custody of the Marshal of the Marshalsea." The latter, however, is a form which has been adopted for a great number of years, although it must have sometimes been equally a fiction, as in the present case; for even under the old law, a party could not be arrested on mesne process for a debt under 20*l*. The statute of 2 Wm. 4, c. 39, does not apply to actions removed from inferior Courts; *Dod v. Grant* (a). [*Patteson, J.*—I am clearly of opinion that that act does not apply. The only question is, whether the statute of Victoria affects the present case.] The 1 & 2 Vict. c. 110, only relates to the arrest. The 2nd section, which enacts, that all actions shall be commenced by writs of summons, applies only to the superior Courts. Assuming that since the 5 & 6 Vict. c. 22, the office of Marshal of the Marshalsea, *eo nomine*, no longer exists, there must still be some one to perform the duties of that office, when a judgment is obtained in the inferior Court.

PATTESON, J.—I am very unwilling to pronounce this declaration to be irregular; because, as at present advised, if this form be incorrect, I do not well see how a plaintiff is to declare, under the circumstances. I will, however, look into the authorities on the subject. It may be, that it may become unnecessary for me to consider what the proper form should be; and that it may be sufficient for the purposes of this application, if I am convinced that it has not been adopted in the present case.

Cur. adv. vult.

PATTESON, J.—I have not been able to satisfy myself as to what is the proper mode of declaring, in a case like the

(a) 4 A. & E. 485; See S. C. 6 N. & M. 70.

present. But as it is here said that the defendant has been "summoned," which is not the fact, the declaration is erroneous in that respect, and must be amended. With regard to the variance between the writ and the declaration, in stating the form of the action, I am inclined to think that it is not material. The rule must, therefore, be made absolute, the plaintiff having liberty to amend in any way he shall think fit, on payment of costs.

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Rule absolute.

REGINA v. NESBITT.

A WRIT of habeas corpus having issued to bring up the body of James Meade Nesbitt, a prisoner in the custody of the police of the city of London, the return was now put in and read.

"County of Tipperary, to wit. By the worshipful the justices of the peace, at the general quarter sessions of the peace, held at Thurles, in and for the county of Tipperary, the 28th day of August, 1844. Whereas James Meade Nesbitt, late of Borrisokane, in the county of Tipperary, stands indicted in the peace-office of the county of Tipperary, for a rescue, at the prosecution of Martin Corbon and John Morgan, and also for a riot, for which he has not as yet received his trial. These are, therefore, in her Majesty's name, strictly to charge and command the police

On return to a writ of habeas corpus, it appeared that the prisoner was detained by virtue of a warrant, purporting to be issued by a Court of quarter sessions in Ireland, and which was duly backed by the indorsement of a metropolitan police magistrate, under 44 Geo. 3, c. 92, s. 3. It stated that the prisoner "stood indicted in the peace office of the county of Tipperary,"

for "a rescue," and for "a riot," and directed "the police of the county of Tipperary" to apprehend him, "and him, so apprehended, in safe custody to keep, so that they might have his body before her Majesty's justices of the peace at the next sessions at," &c.

Held, that the warrant was bad for not shewing any jurisdiction, the term "peace-office" not being one to which the Court could attach a certain and definite meaning.

Held also, that the warrant was bad for directing the police to keep the party in custody till the next sessions.

Semble, that such a warrant should state that the party has not appeared and pleaded, or put in bail.

Semble also, that the Court would take judicial notice that 'a riot' was an offence against the laws of Ireland.

But *quære*, if so of a "rescue?"

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of the county of Tipperary forthwith to apprehend the said James Meade Nesbitt, if he may be found in the said county, and him so apprehended, in safe custody keep, so that you may have his body before her Majesty's justices of the peace, at the next sessions of Nenagh, to be held in the said county, on the 13th day of January next, to answer for the said offence; and this shall be your warrant. Dated this 28th day of August, 1844.

" By the Court,

" JOHN PONSONBY PRETTIE,

" Clerk of the Peace.

" To the Police of the County of Tipperary."

On this warrant, was the following indorsement:

" To all constables of the Metropolitan Police Force, and others whom it may concern. Metropolitan Police District Court. Let this warrant be executed within the said district, proof upon oath having been made before me, one of the magistrates of the Police Court, Bow Street, of the due signature and handwriting of the within-named John Ponsonby Prettie. Given under my hand, at the Police Court, Bow Street, this 8th day of November, 1844.

D. Jardine."

Humfrey, Bodkin, and Sturgeon, appeared for the prisoner, and contended that the warrant was bad, for the following, amongst other, objections^(a): That it did not appear that either of the offences mentioned in the warrant was an offence against the law of Ireland: that the term,

(a) The following objections were also urged; that a clerk of the peace has no power to issue a warrant of apprehension; that the 44 Geo. 3, c. 92, s. 3, does not refer to a case like the present, where an indictment has been found against the defendant; and only applies to parties who have escaped from

some place in Ireland to England, and that it does not appear that the defendant is such a person; and that the indorsement on the warrant had been made under the stat. 24 Geo. 2, c. 55, which does not relate to offences committed in Ireland.

"peace-office," was without meaning; and that it did not shew that the defendant stood indicted in any Court within the jurisdiction of the sessions: and that the warrant ought to have stated that the defendant had not appeared or pleaded, and been admitted to bail; it being consistent with the warrant, that he might be exempt from the liability to be apprehended at the time, on the ground of having found bail.

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Dowdeswell, in support of the return. The Court will take judicial notice, that the common law of England applies to Ireland. It is stated in *Co. Litt.* 141 a, that the law of England was introduced into Ireland in the time of King John; and in the 2 *Inst.* 2, it is said, by the same high authority, that, by Poyning's laws, made anno 10 Hen. 7, all the laws and statutes of this realm were made to extend to Ireland. That being so, the offence of a "riot," is clearly an offence known to the common law of England, and, consequently, an offence against the law of Ireland. It is defined in *Hawk. Pleas of the Crown*, b. 1, c. 65. The term "rescue," also, is, perhaps, sufficiently certain, this being merely a warrant of apprehension, in which the same strictness is not required, as in the case of a conviction; 1 *Hale's Pleas of the Crown*, 584; 2 *Id.* 123; *Hawk. Pleas of the Crown*, b. 2, c. 19, s. 24; *Id.* b. 2, c. 13; 2 *Co. Inst.* 52; *Rex v. Kendal* (a); *Rex v. Crofton* (b); *Rex v. Judd* (c); *Rex v. Wilkes* (d); *Rex v. Wyndham* (e). With respect to the objection that the term "peace-office" is unknown to the law, the words, perhaps, may not be technically accurate; but they are sufficiently intelligible. The clerk of the peace is an officer well known to the law; and is appointed to keep the records of the sessions, by 1 Geo. 4, c. 27. It is no very violent construction of lan-

(a) 1 Salk. 347; See S. C.

(c) 2 T. R. 255.

1 Lord Raym. 65.

(d) 2 Wils. 151.

(b) 1 Sid. 439; See S. C. 2

(e) 1 Stra. 2.

Keb. 614.

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guage, to say, that the words "stands indicted," mean, that the grand jury have presented a bill against the party, which remains on record in the "peace-office;" that is, amongst the other records in the office of the clerk of the peace. With respect to the remaining objection, it is not necessary that the warrant should negative all possible exceptions to his liability to be apprehended. It might equally be urged, that it should go on to aver that he had not been pardoned, or that he had not before been tried for the same offence. *Primâ facie* he is liable to be arrested for the offence; if he have been bailed, that is matter for his discharge, and he should shew it.

Humfrey, in reply. [*Patteson*, J.—I observe that this warrant is directed to "the police of the county of Tipperary," and commands them to apprehend this party, "and keep him in safe custody," until the next sessions. The police have no prison. How can they keep him in custody? The usual form of our warrants, is to take the party before a magistrate, in order that he may be bailed; but this could not be done under a warrant like this.] In that respect, the warrant is clearly bad, and the case resembles the one of *Doswell v. Impey* (a), where the commitment under the Bankrupt Act, directed the party to be kept in custody, until dealt with according to due course of law, or until he should submit himself to the major part of the commissioners; and the Court held it bad.

[*Dowdeswell* suggested that it was the duty of the officer to carry the party, when apprehended, to the county prison, there to be detained till the day appointed for hearing, and then to take him before the justices; and that such must be held to be the meaning of the custody mentioned in the warrant; *Hawk. Pleas of the Crown*, b. 2, c. 16. And that, as to the omission in the warrant of any mention of the right of the party to be bailed, that is an implied ex-

(a) 1 B. & C. 163; See S. C. 2 D. & R. 350.

ception, and need not be stated; and that, at any rate, a mere inaptness of conclusion would not vitiate a warrant of apprehension; 1 *Hale's Pleas of the Crown*, p. 595.]

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PATTESON, J.—I rather think I am bound to take judicial notice, that the common law of England prevails in Ireland; and, if so, whatever doubt I may entertain as to the word “rescue,” the term “riot,” clearly enough designates an offence known and punishable by the common law of England; and, consequently, must be taken to be an offence against the laws of Ireland. In that respect, therefore, the warrant may probably be sufficient; but it is not necessary to pronounce any decision on this point, as there are two defects in this warrant, which I think are fatal, in this country. The one is, that the term “peace-office” has no distinct and definite meaning; and I am therefore unable to see that the proper steps have been taken to bring the offender within the jurisdiction of the Court of Quarter Sessions. In this country, when a warrant issues for the apprehension of a party against whom an indictment has been preferred at the sessions, it is under the seal of the Court, and is headed, “At the general quarter sessions of the peace, holden in and for,” &c., and states that the party “stands indicted in this Court,”—“to which indictment he hath not yet appeared or pleaded,” &c. For this latter statement, there is a good reason; for the warrant ought not to issue, if he were out on bail. But here there is nothing to shew in what Court the defendant stands indicted; or that he has not appeared, and been bailed, and upon that ground has not a perfect right to be at liberty. The other defect is, I think, clearly fatal. The warrant directs the whole body of police of Tipperary to apprehend the defendant, and keep him in custody, “so that you may have his body before her Majesty’s justices of the peace, at the next sessions at Nenagh, to be held in the said county, on the 13th of January.” This is a proceeding entirely contrary to law.

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No magistrate can give the police such a power, for they have no prison, and he cannot create a custody unknown to the law. The sheriff is the proper party to have the custody of offenders, and they should either be placed in his custody, or they must be let out on bail. Unless, therefore, some act of Parliament, relating to Ireland, authorizes this custody, and none such has been cited, I think it is illegal, and the prisoner is, consequently, entitled to be discharged.

Prisoner discharged.

TWYXCROSS v. KING.

(*In the full Court.*)

When the plaintiff delivers the issue, adding the similiter for the defendant, and the defendant gives notice that he has struck out the similiter, but does not deliver any rejoinder or demurrer within the four days limited for that purpose; the proper course for the plaintiff to pursue is to sign judgment for want of a rejoinder: and where he did not do so, but treated the notice as nugatory, and proceeded to trial and judgment, the Court made absolute a rule to set aside the proceedings for irregularity.

THE plaintiff, in this case, had delivered the issue on the 7th of March, to the defendant, containing two replications, concluding to the country, to each of which he had added the similiter for the defendant. On the 10th of the same month, the defendant gave the plaintiff the following notice:

In the Queen's Bench.

Between { Isaac Twycross, Plaintiff,
and
William King, Defendant.

I hereby give you notice, that I accept the issue delivered in this cause as a replication only, and not as an issue, and that the similiter added for the defendant have been accordingly struck out. Dated this 10th day of March, 1844.

Yours,

Edward Thomas Whitaker,
Defendant's Agent.

To Messrs Vallance and Beioley,
Plaintiff's Attorneys or Agents.

The defendant not having replied or demurred within four days from the delivery of the issue, the plaintiff treated the above notice as nugatory, and gave notice of trial for the 27th of March. On the 15th, the defendant delivered a rejoinder to one of the replications, and a special demurrer to the other. The plaintiff, notwithstanding, proceeded to trial, and obtained a verdict, and judgment.

A rule having been obtained to set aside these proceedings for irregularity;

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Platt shewed cause. He contended, that the notice in itself was not sufficient, unless the defendant proceeded within the four days after delivery of the issue, to rejoin or demur. The books of practice state that he may, within four days after the delivery of the issue, strike out the similiter, and rejoin or demur (a). The notice is only a formal intimation to the plaintiff that he has done so; and perhaps, in strictness, may not be requisite. It certainly cannot give the defendant a right to postpone his rejoinder or demurrer to an indefinite time. The form of the notice, as given in *Tidd's Pract. "Forms" (b)*, shews, that the defendant undertakes to rejoin or demur in due time. [*Coleridge, J.*—How can there be a trial, where the replication is left without answer. The plaintiff ought to have signed judgment for want of a rejoinder.] The similiter may be considered as only struck out, on condition that the defendant would rejoin or demur; and not having done so within the proper time, the plaintiff might treat the similiter as if it were restored.

Kelly and *Bovill*, in support of the rule, were not called upon.

PER CURIAM.—The rule must be made absolute.

Rule absolute.

(a) *Tidd's Pract.* p. 726, 9th ed.; *Chitty's Archb. Pract.* p. 204, 7th ed.

(b) p. 250, ed. 1828.

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In re HOWARD.

It is not necessary to wait till the rising of the Court to move the discharge of a prisoner out of custody, on a return to a habeas corpus, where no notice of any opposition to the motion has been given. The Court will order him to be discharged forthwith.

J. P. COBBETT moved to discharge the above-named prisoner out of custody, who had been brought up by writ of habeas corpus. The return shewed a commitment, as it was supposed, under the Masters' and Servants' Acts, which was clearly bad on the face of it. The writ was returnable in this Court, at half-past nine o'clock in the morning; and notice had been given to the prosecutor, &c., to appear at that hour. No intimation of any intention to oppose his discharge had been received; and it was stated by the deputy governor, who had brought him up from the prison, that he believed none was likely to be made. Under these circumstances, perhaps, the Court would order him to be discharged forthwith.

PATTESON, J.—Should you not wait till the rising of the Court, to make this motion? That is the practice on the civil side.

Afterwards, his Lordship stated, that, on inquiry, the practice was said to be, to discharge the prisoner at once; and he accordingly ordered the prisoner to be discharged.

Prisoner discharged.

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WHITE v. HILL and Others.

(In the full Court.)

THIS was an action of trespass quare clausum fregit, and for cutting down trees and carrying away the timber. To which the defendant pleaded the general issue, and pleas denying the trees and timber to be the property of the plaintiff, and alleging the close to be the freehold of one Harrison.

At the trial, at the close of the plaintiff's case, it appeared that there was no evidence against one of the defendants. Upon this an application was made to the learned Judge before whom the cause was tried, to direct a verdict of acquittal as against that defendant, before the case of the other defendants was gone into. This, however, he refused to do, and a verdict was subsequently found for the plaintiff.

Where in an action of trespass, at the close of the plaintiff's case, there is no evidence against one of several defendants, it is in the Judge's discretion whether he will direct a verdict of acquittal to be entered as against him; and where he had refused to do so, and the jury had subsequently found a verdict for the plaintiff against all the defendants, the Court declined to grant a rule for a new trial.

Cockburn now moved for a new trial, on the ground of misdirection, and that the verdict was against evidence; and also on the ground that the Judge should have directed a verdict to be entered in favour of that defendant against whom there appeared no evidence, at the close of the plaintiff's case. In *Child v. Chamberlain* (a), the rule on this subject is expressly laid down by Mr. Baron *Parke*. His Lordship says, "It is now perfectly settled by the unanimous decision of all the Judges, that when at the close of the plaintiff's case there is no evidence against a particular defendant, that defendant is then entitled to an acquittal. In consequence of the discrepancy of practice of different Judges, the matter was brought before them all, and they have determined on that rule." There the defendants, who

(a) 1 M. & Rob. 318; See S. C. 6 C. & P. 213.

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were acquitted, were called as witnesses for the other defendants: but here the application had no such ulterior view. The case of *Sowell v. Champion* (a) is not against the rule thus laid down; for there there was some evidence, although slight, against the defendants, who sought to be acquitted. In *Hawkesworth v. Showler* (b), Mr. Baron Alderson, in delivering judgment, states the rule to be as already given.

LORD DENMAN, C. J.—With respect to this question, it appears to me to be a matter strictly within the discretion of the Judge who presides at the trial. I am not satisfied that the rule is to the effect which is laid down in the case referred to, and I have never acted on that authority. I should certainly be inclined only to direct a verdict of acquittal at the end of the whole case; otherwise a party might, on being acquitted, come as a witness and say, “I was the party who committed this trespass, and the other defendants were no parties to it.”

PATTESON, J., and WILLIAMS, J., concurred.

COLERIDGE, J.—It seems to me that it would be very inconsistent, if after the jury had been directed to pronounce one defendant not guilty, the case for the other defendants should shew that he was, in point of fact, the guilty party.

The case was argued also on the ground of misdirection, and of the verdict being against evidence.

Rule refused.

(a) 6 A. & E. 407; See S. C.
 2 N. & P. 627.

(b) 12 M. & W. 45.



1844.

In re GRAY and Another.

WRITS of habeas corpus had been obtained, directed to the keeper of the House of Correction at Salford, in the county of Lancaster, to bring up the bodies of John Gray and Hugh Blaney, in order that they might be discharged out of custody.

The return to the writ in the case of Gray, set out the following warrant of commitment.

County of Lancaster. } To the constables of Aspull, in the said county, and to the keeper of the House of Correction at Salford, in the said county, and each of them. Whereas information and complaint have this day been made unto me, the Honorable Colin Lindsay, one of her Majesty's justices of the peace in and for the said county, and residing within the same county, by John Johnson, of Aspull, in the said county, coal master, upon the oath of the said John Johnson, that John Gray, of Aspull, in the said county, collier, did contract with the said John Johnson to serve him as a collier at his works in Aspull aforesaid, for the term of twelve months from the 21st day of September last; and did afterwards, to wit, on the 22nd day of September last, enter into the said service; and did afterwards, to wit, on the 2nd day of October, in the year of our Lord, one thousand eight hundred and forty-four, absent himself from his said service, before the term of his said contract was completed; contrary to the form of the statute in that case made and provided: And whereas, in pursuance of the statute in that case made and provided, the said John Gray was on this 11th day of October, at Wigan, in the said county, duly brought before me to answer the said complaint, and I, the said justice, duly thereupon, then and there, in the presence as well of the said John Johnson, as of the said John Gray, did examine and inquire into the proofs and allegations of the said

Where a warrant of commitment under the 6 Geo. 3, c. 25, s. 4, or 4 Geo. 4, c. 34, s. 3, does not recite a conviction, it must appear on the face of it, that the examination, on which the magistrate has proceeded, was on oath, and taken in the presence of the prisoner.

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parties, touching the matter of the said complaint, and upon due consideration had thereof, I have adjudged and determined, that the said John Gray did contract with the said John Johnson to serve him as a collier for the said term of twelve months (a); and did afterwards, before the term of his said contract was completed, to wit, on the said 2nd day of October, in the year aforesaid, unlawfully absent himself from his said service, contrary to the form of the statute in that case made; and I do, therefore, convict him, the said John Gray, of the offence and misdemeanor aforesaid.

These are, therefore, to command you, the said constables, forthwith to convey the said John Gray to the said House of Correction at Salford aforesaid, and to deliver him to the keeper thereof, together with this warrant; and you, the said keeper, to receive the said John Gray into your custody, in the said House of Correction, and him there safely to keep for the space of three months from the date hereof, and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, the 11th day of October, in the year of our Lord, one thousand eight hundred and forty-four.

(Signed)

COLIN LINDSAY. (L. S.)

The warrant of commitment in the case of Blaney was similar, with the exception above noticed, but he was not brought up on the writ of habeas corpus, as it was agreed that his case should be decided by the opinion of the Court with respect to that of Gray.

Upon the return being read,

Bodkin, with whom was *Huddleston*, moved for the discharge of the prisoners. They stated the following

(a) In Blaney's commitment was here inserted, "and did afterwards enter into the said service."

objections to the return: first, that the committal merely says, that the prisoner "did contract," without stating when, and that for anything that appears, it might have been before the passing of the act upon which the conviction took place; secondly, that there is no averment that he entered into the service "in pursuance" of the contract; thirdly, that the terms of the contract should have been stated, in order that the Court might have seen that the Justice was acting within his jurisdiction; fourthly, that it did not appear that the examination by the magistrate into the proofs and allegations of the parties, touching the matter of the complaint, upon which the conviction proceeded, and which was gone into in the presence of the prisoner, was on oath; fifthly, that the evidence was not set out; sixthly, that there was no adjudication of the prisoner's entry into the service of Johnson; seventhly, nor any statement that he was brought before the magistrate upon warrant; eighthly, that the adjudication varied from the complaint, and did not shew any contract to serve in the county; and ninthly, that the warrant did not appear to be issued within the county. There were one or two other objections to the return, which were abandoned on the argument.

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Cowling, in support of the return. As to the first objection, it is immaterial at what time the contract was made: the time of absence should be, and is stated. The statute under which this commitment took place, is the 6 Geo. 3, c. 25, and it is to be assumed, that the contract was subsequent to that time, and, indeed, it is apparent on the face of the commitment that it must have been, for the date of the absence is given, and the absence must have been within twelve months after the making the contract. This objection, if tenable, might have been taken in the case of *In re Walker and Others* (a); for there the same defect that is now alleged, existed. As to the second

(a) 1 Car., Ham. & Allen's New Sess. Cases, 182.

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objection, the entry into service need not be stated. This assumes that the commitment is under 4 Geo. 4, c. 34, s. 3, where a distinction is made between neglecting to enter, and absenting after entering. If this were read in the ordinary manner, the plain inference would be, that the party did enter, or else how could he absent himself. As to the third objection, it is submitted, that all that is required is, that the contract stated should shew that the relation of master and servant existed, and that the employment should be one enumerated or comprehended within the act; *Ex parte Ormrod* (a). The cases of *Ex parte Johnson* (b), *Hardy v. Ryle* (c), and *Lancaster v. Greaves* (d), are all distinguishable; as in all those cases it appeared, that the contracts described were not contracts within the act. So in the case of *In re Tordoft* (e), where a similar objection was taken. As to the fourth objection, this commitment is under the 6 Geo. 3, c. 25, s. 4, which recites, that "artificers, calico printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers, and others, who contract with persons for certain terms, do leave their respective services before the terms of their contracts are fulfilled; to the great disappointment and loss of the persons with whom they so contract;" and enacts, "that if any artificer, &c., labourer, or other person, shall contract with any person whomsoever, for any time," &c., "and shall absent himself from his service before the term of his contract shall be completed; or be guilty of any other misdemeanor; that then, and in every such case, it shall and may be lawful for any justice of the peace, &c., upon complaint thereof made upon oath to him by the person with whom such artificer, &c., labourer, or other person shall have so contracted, or by his or her steward or agent, which oath such justice is

(a) *Ante*, vol. 1, p. 825.

(d) 9 B. & C. 628.

(b) 7 Dowl. 702.

(e) 1 Car., Ham. & Allen's New

(c) 9 B. & C. 603; See S. C. Sess. Cases, p. 171.

4 M. & R. 295.

hereby empowered to administer, to issue his warrant for the apprehending every such artificer, &c., labourer, or other person, and to examine into the nature of the complaint, and if it shall appear to such justice that any such artificer, &c., labourer, or other person, shall not have fulfilled such contract, or hath been guilty of any misdemeanor, it shall and may be lawful for such justice to commit every such person to the house of correction for the county or place where such justice shall reside, for any time not exceeding three months, nor less than one month." This is not a conviction; nor, indeed, according to Mr. Baron *Parke's* opinion (*a*), is there any required. It is merely an order, bearing a strong resemblance to a conviction; but in reality not one. The act is for regulating disputes between masters and workmen; and with this view, various modes are pointed out, some savouring more of punishment than others; but no public offence is included; merely private disputes, on the complaint of either party. The language of the act itself, is the best guide as to whether it is really an order or not, *Rex v. Bissex* (*b*); *Rex v. Cheshire* (*c*): and in section 5, it is termed an "order." If, therefore, it be in reality an order, as it is submitted it is, it is sufficient, if it state enough to shew on the face of it that the justice had jurisdiction to make it (*d*). Now, it clearly appears on the face of this instrument, that a breach of duty has been committed, that complaint was made of it, that the defaulter was brought up, and that the justice has adjudicated on it. In *Rex v. Staffordshire* (*e*), the question was discussed, whether a similar instrument to the present, was an order or not, and the Court held that it was. If this, therefore, be an order, a greater precision will not be required in framing it, than in framing similar orders

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(a) In *Johnson v. Reid*, 6 M. S. C. 2 N. & M. 827. & W. 128.

(b) 1 *Burn's Just.* 969, Wms. edit. 1836. (d) Per *Taunton, J.*, in *Rex v. Davis*, 5 B. & Ad. 551; See S. C. 2 N. & M. 349.

(c) 5 B. & Ad. 439, 442; See (e) 12 *East*, 572.

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under other acts ; as, for instance, the vagrant acts. There the word conviction is used ; and yet the practice has ever been not to treat them as such ; *Rex v. Rhodes* (a) ; *Rex v. Cooper* (b). No evidence is ever set out, as may be seen on referring to the forms under the 17 Geo. 2, c. 5, s. 7, in *Burn's Just.* tit. "*Vagrant.*" In *Rex v. Cavanagh* (c), which may be cited on the other side, the decision mainly proceeded on the ground that the warrant shewed on the face of it no sufficient case of vagrancy. In the ordinary case of orders of removal, it is not necessary to state the examination is on oath ; *Munger Hunger v. Warden* (d). [*Patteson*, J. — That is merely an *ex parte* proceeding ; whereas, in the present case, is a party to be deprived of his liberty, on a penal act like this, without an opportunity of cross-examining the witnesses ? It cannot matter what the instrument is called, whether an order or a conviction. It is a mere dispute about terms.] In the case of *In re Tordoft* (e), nothing is said by Lord *Denman* as to the necessity of the examination being upon oath. In that case, it turned merely upon the fact of the witnesses not being examined in the prisoner's presence. In the case of *Regina v. Lewis and Others* (f), where it was held that the examination should be stated to be upon oath, the view now presented was not taken ; nor, indeed, does the point seem there to have been much contested. If the objection that is here taken be correct, all the evidence must for the future be set out ; for some of the witnesses may have affirmed, and how can the Court say which have rightly done so. *In re Walker and Others* (g) substantially decides that it is not necessary to set out the examination on oath ; for there a warrant of commitment, defective in this respect, was held good ; and although, on the ostensible

(a) 4 T. R. 220.

(b) 6 T. R. 509.

(c) 1 Dowl. 546, N. S.

(d) 2 Sess. Ca. 40, cited in
Burn's Just. tit. "*Poor,*" "*Exa-*
mination."(e) 1 Car., Ham. & Allen's New
Sess. Ca. p. 171.(f) *Ante*, vol. 1, p. 822.(g) 1 Car., Ham. & Allen's New
Sess. Ca. p. 182.

ground that it recited a conviction, the case of *Rex v. Justices of Staffordshire* (a), shews that there could be no other document. The fifth objection has been disposed of, in considering the fourth. The answer to the sixth objection, is, that no adjudication of entry into the service is required by the act. As to the seventh objection, the justice is "authorized and empowered," on due complaint, to issue his warrant; but it is absurd to contend that he cannot proceed to hear the complaint, if the party be otherwise before him. As to the eighth objection, it is submitted that it sufficiently appears that the adjudication is, in respect of the only contract mentioned, namely, to serve at Aspull, within the county. The objection really amounts to this, that the word "aforesaid" is omitted; but the Court will supply this, where the necessary intendment is in favour of it; *Com. Dig.* tit. "Pleader," (C 18); *Bancks v. Camp* (b). As to the ninth objection, the justice is stated to be residing within, and acting "in and for, the said county;" and the complaint and examination are all in the same day, and the latter is stated to be taken "at Wigan, in the said county." This objection was taken *In re Walker and Others* (c), and overruled. It is submitted, that whilst the Court will require a reasonable precision in such documents as the present; they will guard against too great a strictness of construction, which may defeat the purpose of the act.

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Bodkin and Huddleston, contra. This return is bad, for the reasons that have been assigned. With respect to the third objection; for aught that appears upon this commitment, the contract of service might have been of the same nature as those which, in the cases of *Ex parte Johnson* (d), *Lancaster v. Greaves* (e), and *Johnson v.*

(a) 12 East, 572.

Sess. Ca. p. 182.

(b) 9 Bing. 604; See S. C.

(d) 7 Dowl. 702.

2 M. & Scott, 734.

(e) 9 B. & C. 628.

(c) 1 Car., Ham. & Allen's New

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Reid (a), were held not to be within the meaning of these acts. As to the fourth and fifth objections, it is pretty clear that the commitment is under the 4 Geo. 4, c. 34; but whether it be or not, it is apprehended that the Court will still require that the magistrate should shew, on the face of a document of this nature, [which, by whatever name it be called, is a conviction and warrant of commitment in one and the same piece of paper, *In re Tordoft* (b),] that he has proceeded in his adjudication upon evidence given on oath, and in the presence of the prisoner; so that it shall appear that the prisoner has had the opportunity of cross-examining the witnesses as to the facts to which they testify. It may probably be necessary, that the magistrate should set out the evidence on which his adjudication proceeds, and the leaning of the Court, in *In re Tordoft*, seems to be in favour of this view. We are not, however, compelled to argue the affirmative of this. It is sufficient, that it does not appear that the examination on which the justice proceeded in his adjudication, was on oath; and the case of *Regina v. Lewis* (c), is a direct authority on this point, to shew that the commitment is therefore bad. *In re Tordoft*, is an authority also in favour of this objection; although, in that case, there was undoubtedly another defect, namely, that the examination did not appear to be taken in the presence of the prisoner. The case of *Rex v. Crowther* (d), shews, that it must be stated that the witness was sworn, as well as examined, in the presence of the party; and that it is not sufficient to read over the deposition in the prisoner's presence. As to the sixth objection, it is quite consistent, that he may, after the contract mentioned in the commitment had expired, have entered into a fresh contract, in respect of which the magistrates might have no jurisdiction. The Court will

(a) 6 M. & W. 124.

(b) 1 Car., Ham. & Allen's New
Sess. Ca. p. 171.

(c) *Ante*, vol. 1, p. 822.

(d) 1 T. R. 125.

not intend jurisdiction, unless a *primâ facie* case of jurisdiction appear on the face of the proceedings; *Regina v. Fuller* (a).

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PATTESON, J.—I was desirous of hearing this case argued at length, because I was struck with one or two of the points made. Mr. *Cowling*, however, has satisfied me to this extent, that I do not think that there is much in any of the objections, except the principal one, that the examination is not stated to be upon oath; although, at the same time, I do not wish to be understood as expressing any decided opinion with respect to them.

Looking at the two cases now before me, the one of a prisoner called Gray, and the other of a prisoner called Blaney, I cannot bring my mind to believe, that the magistrate was proceeding under the statute 6 Geo. 3, c. 25, in the former case. In the conviction of Blaney, it is distinctly recited, that he had contracted and entered upon the service, and then comes the adjudication that he had so contracted, and had so entered upon his contract. In the conviction of Gray, precisely the same complaint is made, but the adjudication that he entered on the service, is no doubt accidentally omitted by the clerk of the magistrates; and it is now convenient to say, that the conviction has taken place under a different statute.

But be this, however, as it may, the question really turns on this, whether it is necessary to state in this instrument that the examination by the magistrate, in the presence of the prisoner, was an examination upon oath? And looking at the two cases which have been cited, the one in this Court of *Regina v. Lewis* (b), and the other in the full Court, of *In re Tordoft* (c), they seem to me to go the whole length of shewing, that this conviction, or order, or whatever it may be called, is bad. I cannot bring my

(a) *Ante*, p. 98.

(b) *Ante*, vol. 1, p. 822.

(c) 1 Car., Ham. & Allen's New Sess. Ca. p. 171.

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mind to think, that it is a right way of construing an act like this to say, because the act does not state a particular form, or use a particular word, that this is, therefore, not a conviction, but an order. If a statute says that an offence is committed by certain acts; and authorizes a magistrate to commit and punish for that offence; I cannot consider that an instrument by which the magistrate says that the party was brought before him and convicted, is anything else but a conviction. I cannot quite understand why, when the magistrate does say, "I do, therefore, convict him," he does not also go on to adjudicate the punishment, but leaves the latter part to run as merely a warrant to the gaoler for his custody: perhaps, it may have been with a view of treating this as an order, and not as a conviction.

I am not bound to determine on the present occasion, whether it be necessary to set out the evidence in an instrument of this kind? That point will no doubt be raised some day, and it is very fitting that it should be determined; but sitting alone in this Court, I think I ought not to express any opinion upon it, where the case does not require it.

The question that I have now to decide is, whether I can infer from the terms of this commitment, that witnesses were called on the part of the complainant, and examined on oath. If so, I must infer it from the words, "duly examined into the allegations and proofs." The word "allegations" may mean allegations in writing, or by word of mouth, or an argument of law, or an assertion of fact; it is a very vague and uncertain word. If the word "proofs," meant only legal proof upon oath, there might then be some foundation for the inference; but I am not bound to attach this meaning to the word, nor do I think I reasonably can. It may be that the magistrate may have thought it sufficient if he read over the complaint to the party, and did not examine the witnesses again; and it may be that the person who made the complaint, would not have been able to have proved the facts. It ought, therefore, to have appeared, that there was an examination of witnesses upon oath, in

the presence of the party. Whilst the defect in the case of *In re Tordoft* (a), has been avoided in the present instance, the very error which was fatal in *Regina v. Lewis* (b), has been fallen into. Taking both those cases together, I think I must consider the law to be, that where, under this act of Parliament, the conviction and warrant of commitment are in the same document, (which it is by no means necessary that they should be, but which they are in the present case,) it must appear on the face of that document, that the evidence on which the conviction proceeds was given on oath, and in the presence of the prisoner.

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I have taken the opportunity of mentioning this case to the other Judges, and they agree with me in the opinion I have just expressed. I say this, in order that the question may be considered to have been decided.

Prisoners discharged.

(a) 1 Car., Ham. & Allen's New Sess. Ca. p. 171.

(b) *Ante*, vol. 1, p. 822.

NICKALLS v. WARREN.

(*In the full Court.*)

THIS was an action by one mill proprietor against another for penning back the water of a mill stream, so as to impede the working of the plaintiff's mill. At the trial, which took place at the Summer Assizes in 1843, at

Where upon a rule to set aside an award on the ground that it was not final, and that the arbitrator had not awarded

on one of the matters in difference, the Court ordered, under a clause to that effect in the submission, "that the matters referred, &c., be remitted back to the arbitrator for his re-consideration and re-determination;" *Held*, that the arbitrator was bound to hear evidence tendered by one of the parties respecting the matters in difference, which had come to the knowledge of that party since the making of the original award.

Semble, that the clause in a submission of reference empowering the Court to remit the matters back to the arbitrator, should be to remit the matters, "or any of them;" so that the Court may be enabled to limit the remittal.

Quære, if the Court, under such a clause, have power to remit the matter back to the arbitrator a second time?

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Chelmsford, a verdict had been entered for the plaintiff, by consent, for 500*l.* damages, and 40*s.* costs, subject to the award of a gentleman at the Bar, who was to direct for whom the verdict was to be finally entered; and to determine generally all matters in difference between the parties, and also to determine to what head of water the occupier of the defendant's mill was entitled, and to ascertain and determine the rights of the parties to the reference respectively, as regarded the use of the stream, and, if necessary, to direct the mode in which such rights should be exercised. The order of reference contained a clause empowering the Court, in the case of any dispute relative to the award, "to remit the matters thereby referred to the re-consideration and determination of him, the said arbitrator." The arbitrator having made his award, which merely directed that the verdict entered for the plaintiff should be set aside, and that the verdict should be entered distributively on certain issues for the plaintiff, and on certain other issues for the defendant; a rule nisi was obtained in Hilary Term last, on behalf of the plaintiff, to set aside the award, on the ground of want of finality; because the arbitrator had not awarded to what head of water the defendant, as occupier, was entitled, nor whether the defendant was entitled to pen the water back on the plaintiff's premises, and to what extent; nor to what height of water the defendant was entitled to keep the water in his penstock; nor whether a ditch mentioned in the pleadings was an open ditch; and because he had not ascertained the rights of the parties as regarded the use of the stream of water. On the rule being argued, the Court made an order in the terms of the order of reference, namely, "that the matters referred to the arbitrator in this cause by order of assizes, bearing date," &c., "be remitted back to the said arbitrator for his re-consideration and re-determination." It then appeared, by the affidavit of the plaintiff's attorney in support of the present motion, that at the meeting fixed by the arbitrator in pursuance of the

above order, the plaintiff's counsel tendered several witnesses on his behalf "to shew that the penstock at the mill of the defendant had been so raised from time to time, as to disentitle him to maintain the head of water in his present penstock to the height mentioned in the further award of the arbitrator;" but that the arbitrator "refused to admit such evidence, and declined to receive any further evidence in the matter in difference in the cause." The affidavit also stated that the deponent "had not, either at or previously to the making of the original award by the said arbitrator, any knowledge of the witnesses whose testimony was sought to be given on behalf of the said plaintiff, or their evidence would have been previously tendered, and must have been admitted and received." There was also an affidavit by the plaintiff himself, that he had discovered these witnesses since the making of the original award; and that the effect of the further award would be to materially impede the working of the plaintiff's mill. The further award of the arbitrator was added at the foot of the original award, and was in these words: (after reciting the order of the Court referring the matters back to him for re-consideration and re-determination,) "I further award and determine that the defendant, and the occupiers of the mill of the defendant in the pleadings of the said cause mentioned, are entitled to retain the penstock now attached to the said mill, and to have and maintain therein a head of water of the depth of fifteen inches, and no more."

A rule nisi having been obtained to set aside this further award, on the ground of the rejection of the evidence of the above witnesses;

Platt, Montagu Chambers, and Lush, now shewed cause. As the head of water which the occupier of defendant's mill was entitled to keep, was one of the matters expressly referred by the original order of reference, the arbitrator had heard all the evidence which the parties were able to

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lay before him. It was, therefore, in his discretion whether he would hear any more witnesses, or decide the matter upon the evidence already before him. [Lord *Denman*, C. J.—Suppose the arbitrator had chosen to receive additional evidence, in spite of a protest from either side; would the award have therefore been bad?] It was at his option to receive or reject further evidence.

Kelly and Bramwell, in support of the rule. This was one of the points on which the arbitrator had omitted to award. When, therefore, the case was remitted to him for his re-consideration and re-determination, he was bound to hear any evidence that might be tendered on the point, so as to enable him properly to award upon it.

Lord DENMAN, C. J.—The clause which empowers the Court to remit the matter back to the arbitrator for his re-consideration and re-determination, is a clause of recent introduction in orders of reference, and is not, I think, in the present instance, very happily worded; as it contains no words of limitation as to the matters to be remitted by the Court. It only empowers the Court to “remit the matters thereby referred to the re-consideration and determination of him the said arbitrator.” It would have been perhaps better, if the power had been to remit the matters back “or any of them,” as then the Court might have limited the remittal. Here, however, all the matters are remitted back to the arbitrator, who is in a position to rehear the whole case; and being so, is, as it appears to me, bound to hear any additional evidence which either party may lay before him. It was said, when the former rule was disposed of, that the arbitrator doubted if he had power to fix the head of water; but the Court then decided that he had. The matter being then before him on this point, we think he was bound to hear the evidence which was tendered.

WILLIAMS, J., concurred.

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COLERIDGE, J.—The clause should be so worded as to enable the Court to remit to the arbitrator the matters or “any of them;” so that the Court might modify the inquiry before the arbitrator, when his award is sent back to him.

WIGHTMAN, J., concurred.

Platt then applied to send the matter back to the same arbitrator.

Kelly, *contra*. The award must be set aside. The Court having once exercised the power conferred on it by the clause, that power has become exhausted. Besides, the Court will not remit the matter back to the same arbitrator, who has already twice miscarried.

PER CURIAM.—There may be some doubt as to the power of the Court to remit the case a second time. Under the present circumstances, the Court think it only reasonable that it should not be sent back to the same arbitrator.

Rule absolute to set aside the award.



RHODES and Another, Assignees, &c. v. THOMAS and Others.

LUSH shewed cause against a rule which had been obtained by *E. V. Williams*, on behalf of one of the above named defendants, for judgment as in case of a nonsuit. He objected that the action being brought against three defendants, a similar rule had already been obtained at the suit of the other two defendants, in which the plaintiff had given a peremptory undertaking. [*Patteson*, J.—

Where there are several defendants, appearing by separate attorneys, they may each move for judgment as in case of a nonsuit.

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Have the defendants appeared by one attorney, or separately?] They have appeared by separate attorneys.

PATTESON, J.—I do not see that there is any objection to the present motion. The defendants are entitled to act independently of each other. The plaintiff must give a peremptory undertaking.

Rule accordingly.

NEWTON v. HOLFORD and Others.

(*In the full Court.*)

Trespass for breaking and entering plaintiff's house, and assaulting and beating his son: *Held*, that the defendants might pay money into Court under a Judge's order, by virtue of 3 & 4 Wm. 4, c. 42, s. 21.

TRESPASS. The first count was for breaking open the outer door of the dwelling-house of the plaintiff, and forcibly entering therein, and remaining and continuing therein, making a noise and disturbance, and breaking the locks, bolts, &c.; by means of which premises the plaintiff and his family were disturbed in their peaceable possession, and hindered and prevented from carrying on the plaintiff's usual affairs and business. Second count: "that defendants, to wit, on, &c., aforesaid, wrongfully and unlawfully, with force and arms, &c., and with a strong hand, forced and broke open the outer door of a certain other dwelling-house of the plaintiff, then occupied by him, called, &c., situate and being, &c., aforesaid. And the defendants, with force and arms, &c., through the said door, when so forced and broken open as aforesaid, the said door before, and at the time of the said breaking open of the same being closed, locked, and fastened, and not open, violently and unlawfully entered into the said dwelling-house of the plaintiff; and then so being in the same, with force and arms, &c., therein assaulted Francis Robert Newton, then and still being the son and servant of the plaintiff, and then beat, bruised, and ill-treated the said

Francis Robert Newton, insomuch that by means thereof he then became and was sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, for one month then next following, during all which time the plaintiff lost and was deprived of the service of his said son and servant, and of all the benefit and advantage which might and would otherwise have arisen and accrued to the plaintiff from such service." The third count was similar, stating that the defendants broke and entered into the dwelling-house of the plaintiff, and also into a close within the curtilage, and there made an assault upon another son of the plaintiff, stating the damage of loss of service as in the second count, and concluding, "by means of which premises the plaintiff and his family were for a long space of time, to wit, &c., greatly disturbed and annoyed in the peaceable possession of the said curtilage of the said dwelling-house of the plaintiff, and of all the benefits and advantages which might, and otherwise would have arisen and accrued to him from the peaceable possession, use, occupation, and enjoyment of his said curtilage." *Alia enormia*. To this the defendants had pleaded, under a Judge's order, payment of money into Court, and no damages ultra. The plaintiff replied greater damages, upon which issue was joined.

At the trial, before *Tindal*, C. J., at the Autumn Assizes for Gloucestershire, a verdict was found for the defendants on the above plea.

Newton now moved for a rule nisi for a repleader, on the ground that the defendants had no right to plead payment of money into Court, the above action coming within the exception in the stat. 3 & 4 Wm. 4, c. 42, s. 21, which authorizes the above plea in certain forms of action. That section enacts, "that it shall be lawful for the defendant in all personal actions (except actions for assault and battery, false imprisonment, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,) by leave of," &c., "to pay into Court

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a sum of money by way of compensation or amends," &c. The present is an action which embraces a claim for damages for an assault and battery of the plaintiff's son. The statute makes no distinction between an assault and battery of the plaintiff, or the plaintiff's wife, and any other member of his family; and was clearly intended to exclude all cases where personal violence was the injury complained of, and for which the action was brought.

Lord DENMAN, C. J.—I am clearly of opinion that the present action is one within the act of Parliament, and to which therefore the defendants may plead payment of money into Court by way of amends. The words "actions for assault and battery" in the exceptive clause of the section, clearly mean actions where the injury of the plaintiff himself, or of his wife, where she joins in the action, is the subject of the action. Where the assault is upon some member of the plaintiff's family, or person in his service; then the gist of the action is the loss sustained, and the case is not within the exception.

WILLIAMS, J., COLERIDGE, J., and WIGHTMAN, J., concurred.

Rule refused (a).

(a) 'The plaintiff afterwards having sued out a writ of error on the same ground, a rule nisi was obtained in the Bail Court, on behalf of the defendants, to issue execution for their costs, notwithstanding the allowance of the writ of error.

Newton shewed cause.

Talfourd, Serjt., in support of the rule, was not heard.

PATTESON, J.—If I entertained the slightest doubt on the subject, I should pause before I authorized

execution to issue, after a party has proceeded to obtain a writ of error. But I am of opinion, that this is clearly not an action "of assault and battery" within the meaning of the exception in the statute; and that the ground of error, therefore, is frivolous. The question has been already decided in the full Court, on a motion in arrest of judgment.

Rule absolute.

The above judgment of the full Court was afterwards affirmed by the Court of Exchequer Chamber, in Hilary Vacation, 1845.

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A rule had been obtained, calling on the attorney of the plaintiff to shew cause, why the sum of 2*l.* 10*s.*, the costs claimed on the copy of the writ of summons issued in this cause, and paid by the defendant within four days from the service thereof, should not be referred to one of the Masters to be taxed, the plaintiff's attorney to refund what, if any thing should be found to be overpaid. The facts were shortly these. The defendant had been served with a writ of summons, on the 1st of July last, indorsed, "The plaintiff claims 2*l.* 5*s.* for debt, and 2*l.* 10*s.* for costs," &c. The defendant's affidavit stated, that although the plaintiff claimed 2*l.* 5*s.* for his debt, yet that the sum of 2*l.* 1*s.* 5*d.*, and no more, was actually due to him from the defendant, as appeared by a statement under the hand of the plaintiff, of which the following was a copy :

	£.	s.	d.
1842, October 8th, To goods . . .	1	14	1
December 3rd, To ditto. . .	1	7	4
	<hr/>		
	3	1	5
By cash, One pound, Jno. Young	1	0	0
	<hr/>		
	£2	1	5
	<hr/>		

Where a sum of money, less than the amount of the debt and costs indorsed on a writ of summons, has been paid and accepted within four days of the service, the defendant is not entitled to have the costs taxed under the rules of H. T., 2 Wm. 4, r. 11, and M. T., 3 Wm. 4, r. 5, unless it distinctly appear that the deduction was from the debt, and not from the costs; or that it was acknowledged on the part of the plaintiff that there was a mistake in the amount of the debt indorsed.

On the 4th of July, defendant sent a letter to Mr. Ward, the plaintiff's attorney, enclosing a Post Office order for 4*l.* 11*s.* 5*d.*, being the amount of 2*l.* 1*s.* 5*d.*, which he contended to be due, together with the sum of 2*l.* 10*s.*, the costs claimed; but what were the terms of that letter, did not appear. On the 6th of the same month, the following answer was received from the clerk to the plaintiff's attorney:

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“Wolverhampton, 5th July, 1844.

“Young v. Yourself,

“I beg to acknowledge the receipt of a Post Office order for the amount of debt and costs herein.

“Yours obediently,

“H. W. Hocknell,

“for J. C. Ward.”

The defendant then took out a summons, returnable before Mr. J. *Maule*, at Chambers, to the same effect as the present motion. The affidavits were contradictory, as to what took place before that learned Judge. The summons, however, was dismissed, with costs; and the present rule was afterwards obtained.

F. V. Lee shewed cause. The defendant is not entitled to make this motion. By Reg., Gen., H. T., 2 Wm. 4, r. 11, which is extended by Reg., Gen., M. T., 3 Wm. 4, r. 5, to writs of summons, &c., the amount of debt and costs is to be indorsed upon the writ, and “upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed,” &c. Here the amount indorsed was 4*l*. 15*s.*, whilst the sum remitted is only 4*l*. 11*s.* 5*d.* It is true, that the defendant seeks to make it appear, by his affidavit, that the deduction was from the debt, and not from the costs; but it does not appear, as he might have shewn, that he specified this distinction in his letter inclosing the Post Office order. It may be, that the plaintiff’s attorney has handed over to his principal the full amount of the debt, retaining the less sum only for his costs.

Gray, in support of the rule. The party should be entitled to the benefit of the rule, if he tender the real amount of the debt due, with the costs indorsed on the

writ. Otherwise, it might always be in the power of a plaintiff, who wished to burthen the defendant with costs, to indorse a larger sum than is really due for the debt, so as to except him from the benefit of the rule. The attorney is bound to indorse the real amount of debt due, and the costs. Here, it is evident, a mistake has been made of a few shillings, in the amount of the debt indorsed; and the defendant should not be thereby precluded from having the costs taxed; because he omitted to specify, what it would certainly have been more prudent to have done, that the less sum which he paid, was in respect of the debt, and not of the costs.

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Cur. adv. vult.

PATTESON, J.—I have looked at the affidavits in this case, and spoken to the other Judges on the subject. The difficulty is, that there is no distinct proof that the defendant, in sending a less amount than the amount of debt and costs indorsed on the writ, divided the sum so sent, appropriating the less sum to the debt, and the full sum for the costs. Nor does it distinctly appear, that there was any acknowledgment, on the part of the plaintiff's attorney, in accepting the amount, that there had been any such mistake, as the defendant alleges, as to the real amount of the debt. That being so, the question then is, whether the terms of the rule of Court, under which this application is made, must not be strictly followed; and I am of opinion that they must be. The rule says, "that the defendant shall be at liberty, notwithstanding such payment;" that is, payment of the amount of the debt and costs indorsed on the writ, "to have the costs taxed, &c." But, in the present case, a less sum has been paid than the amount of the debt and costs indorsed on the writ, and the defendant has not therefore brought himself within the terms of the rule. Unless there were proof, therefore, that the parties had acknowledged there was a mistake in the amount of the debt indorsed, I think I must take this to be a case in

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which the defendant has not paid the amount of the debt and costs indorsed on the writ, and that this rule must consequently be discharged. My Brother *Maule* seems to have been of this opinion, when the case was before him at Chambers. I am quite sensible, as Mr. *Gray* suggested, that designing parties may indorse a larger sum upon the writ, than is really due, in order to deprive the defendant of the benefit of this rule: but, in such a case, the defendant is not without remedy; for he may come to the Court, for a stay of proceedings, on payment of the sum really due; and if the plaintiff choose still to proceed, he does so at his own peril, and must abide the consequences. This rule must, therefore, be discharged.

Rule discharged.

STULTZ and Another v. WYATT.

(*In the full Court.*)

Where in proceedings to outlawry, the writ of proclamations commanded the sheriff to proclaim the defendant on three several days, "according to the form of the statutes for such purpose made, in the 31st year of the reign of Elizabeth, late

Queen of England, and the 1st and 2nd years of the reign of her Majesty Queen Victoria, one of such proclamations to be made at or near the most usual church door of the parish," &c.; and the sheriff returned that he had proclaimed the defendant "at the most usual door of the church of the parish of," &c.: *Held*, that the Court would not set aside these proceedings for irregularity, where the defendant had obtained a previous rule for the same purpose, which had been discharged; although the objections now taken were different: but would leave the defendant to his writ of error.

and in the first and second years of the reign of her present Majesty, Queen Victoria, one of such proclamations to be made at or near the most usual church door of the parish," where the said defendant was residing, &c. To this writ, the sheriff made the usual return, that he had caused proclamations to be made at his county Court, at the general quarter sessions, and "at the most usual door of the church of the parish of St. George, Hanover Square, in his said county," being the parish where the defendant was residing at the time of the exigent awarded.

On the 10th of August, 1843, a summons was obtained on behalf of the defendant, returnable before a Judge at Chambers, calling on the plaintiff to shew cause why the outlawry, and all proceedings had thereon, should not be reversed, on the following grounds: *viz.*; first, that the writ of *distringas* in this cause was not filed of record at the time the exigent was awarded, nor was the same filed on the 3rd or 4th days of May last; secondly, that the defendant was beyond the seas at the time the exigent was awarded; thirdly, that the writ of proclamations was not directed to the sheriff of the county where the defendant was actually dwelling at the time the exigent was awarded herein; and fourthly, that the third proclamation under the said writ, was not made at the church door of the parish where the defendant was dwelling at the time of the awarding of the exigent. The parties accordingly attended before the Judge, who declined to make the order in the terms prayed for, and stated, that the only order he should make was to reverse the outlawry, upon payment of costs, and upon entering an appearance for the defendant; and, accordingly, so indorsed the order. The defendant, however, never drew up this order.

In Michaelmas Term, 1843, the defendant obtained a rule nisi in this Court, to reverse the outlawry upon the same grounds; which rule, upon argument, was discharged, with costs.

In the present Term, the defendant again obtained a

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rule nisi (a) for the same purpose, on the ground that the writ of proclamations and return were defective, in the sheriff being commanded to make the proclamations according to the form of the statutes of 31st of Elizabeth, and the 1 & 2 of Victoria; whereas there is no such statute as the latter relating to outlawries: and also, in the old form under the 31st Elizabeth being used, commanding the sheriff to make one of the proclamations at or near the most usual church door of the parish, where the defendant was dwelling, which defect was followed in the return; whereas the new form under the 7 Wm. 4, and 1 Vict. c. 45, should have been adopted.

By one of the affidavits in support of the present rule, it appeared, that besides the church of St. George, Hanover Square, there was another church, and several chapels in that parish.

The affidavits in answer set out the foregoing attempts made by the defendant to reverse the outlawry. There was also an affidavit by the sheriff's officer who had made the proclamations, that his invariable practice had been, since the statute 7 Wm. 4, and 1 Vict. c. 45, to cause notices of proclamations to be affixed to the doors of all the churches and chapels within the parish, where the defendant was stated to reside; and that he had prepared such notices in the present case, and delivered them to the persons who usually assisted him in affixing such notices for that purpose, and that he believed such notices had been accordingly affixed; but that from the lapse of time, he could not specify who those persons were. And that he had, at the time, indorsed on the sheriff's warrant, to him directed for that purpose, the fact that the proclamations in this case had been duly made.

W. H. Watson shewed cause. The defendant has no right to come again to the Court to ask them to reverse his

(a) In the Bail Court.

outlawry, when the Court has already discharged a rule for the same purpose; *The King v. Orde* (a). Here the irregularity, if any, is apparent on the face of the proceedings, and as the defendant can take advantage of it by writ of error, this Court will not interfere on motion. It would appear from the affidavit of the sheriff's officer, that the proclamations have, in point of fact, been duly made, although it may not have been so stated in the return to the writ; that fact will form another reason why the Court, in the exercise of its discretion, should refuse to interfere in this summary manner. At the utmost, however, the Court would only grant this motion on payment of costs, and undertaking to enter an appearance in the action; *Taylor v. Waters* (b), *Lewis v. Davison* (c), *Rayer v. Cooke* (d).

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Sir J. Bayley, *contra*. The Court will always relieve a defendant from an outlawry where the proceedings are manifestly irregular; which it is submitted they are in the present instance. The sheriff is commanded to make proclamation "at the most usual door of the church of the parish" where the defendant resides; which, in his return, he says he has done. This is clearly bad, for by the 7 Wm. 4, and 1 Vict. c. 45, the proclamation should now be made at every church and chapel in the parish; *The Queen v. Whipp* (e). The sheriff, too, is commanded to make these proclamations according to the form of certain statutes, one of which is described as a statute in "the 1 & 2 Vict.;" whereas there is no such statute respecting proceedings in outlawry. The former rule which was obtained to set aside this outlawry, was obtained on different grounds. An irregularity of this nature cannot be waived.

(a) 8 A. & E. 420, note (a). See *Joyes v. Collinson*, *ante*, p. 449, and the cases there collected at p. 451, note (a).

(b) 3 D. & R. 575; See S. C. 2 B. & C. 353.

(c) 1 C., M. & R. 655; See S. C. 3 Dowl. 272; 5 Tyr. 198.

(d) 3 B. & C. 529; See S. C. 5 D. & R. 302.

(e) 4 Q. B. 141; See S. C. 3 G. & D. 372.

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PER CURIAM.—We cannot accede to this application, which has been already before the Court, and refused. If the defendant thinks he has any ground for setting aside the proceedings, he can bring a writ of error.

Rule discharged.

REGINA, on the Prosecution of WILLIAM HICKINBOTHAM,
 v. JOHN SYDSERFF and Another.

On motion to
 estreat into the
 Exchequer, a
 recognizance
 into which the
 defendant had
 entered, with
 two sureties,
 for the purpose
 of removing an
 indictment for
 conspiracy
 from the Cen-
 tral Criminal
 Court into
 this Court :
Held, that it
 was no objec-
 tion that the
 recognizance
 was not entered
 of record in
 this Court ;
 or that the
 application was
 with a view of
 obtaining the
 costs of the
 prosecution, on
 the defendants
 being con-
 victed, and the
 recognizance
 was not con-
 ditioned for
 their payment ;
 or that it did
 not appear that
 there had been
 any notice of
 taxation ; or
 that it did not appear that the justice of the peace before whom the recognizance was taken,
 was acting within his own county.

A RULE had been obtained (a), calling on the above named defendant, John Sydserrf, and C. B. Robinson and T. Hamilton, his bail, to shew cause why the following recognizance of the said defendant, and his bail, should not be estreated into the Exchequer.

Middlesex. Be it remembered, that on the thirty-first day of March, in the sixth year of the reign of our Sovereign Lady Victoria, by the grace of God, Queen of the United Kingdom of Great Britain and Ireland, defender of the faith, John Sydserrf, of 19, Addle Street, Wood Street, Cheapside, in the city of London, and of Crescent Cottages, Hackney, in the county of Middlesex, merchant, Charles Barker Robinson, of 14, Tower Royal, in the city of London, collector of the Chartered Gas Company, and Thomas Hamilton, of Hamilton Yard, Marsh Gate, Lambeth, in the county of Surrey, coach builder, come before me, Thomas Bulcock Burbidge, Esq., one of her Majesty's justices of the peace in and for the county of Surrey, and acknowledge to owe our said Lady the Queen the several sums following ; that is to say, the

(a) In Trinity Term.

said John Sydserrf the sum of eighty pounds, and the said Charles Barker Robinson, and Thomas Hamilton, the sum of forty pounds each, of lawful money of Great Britain, to be levied upon their several goods and chattels, lands and tenements, to her Majesty's use: upon condition that if the said John Sydserrf shall appear in her Majesty's Court of Queen's Bench at Westminster, on the first day of Easter Term, 1843, and shall plead to all and singular indictments of whatsoever conspiracies and misdemeanors whercof he, with another, stands indicted, and at his own proper costs and charges, shall cause and procure the issue or issues that may be joined thereon, to be tried in the same Term, or at the sittings of Nisi Prius, to be holden after the same Term, in and for the county of Middlesex, if the said Court shall not appoint any other time for the trial thereof; and if the said Court shall appoint any other time, then at such other time; and shall give due notice of such trial to the prosecutor, or his clerk in Court, and shall appear from day to day in the said Court, and not depart until discharged by the said Court: then this recognizance to be void, or else to remain in full force.

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JOHN SYDSERFF.

CHARLES B. ROBINSON.

THOMAS HAMILTON.

Taken and acknowledged the day
 and year first above said,

T. B. BURBIDGE,

A Magistrate for Surrey.

The defendant, Sydserrf, had been indicted at the Central Criminal Court, with another party of the name of Stevenson, for certain conspiracies, and had removed the case into the Court of Queen's Bench by certiorari, on which occasion the above recognizance was entered into. Sydserrf had duly appeared and pleaded, and had been sentenced to an imprisonment of six months, which he was now undergoing in the Queen's Prison; and this appli-

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cation was made with a view of recovering the costs of the prosecution. A copy of the rule of Court referring the costs to the coroner and attorney of the Court to be taxed, with his appointment thereon of a day to tax peremptory, and his allocatur of 124*l.* 14*s.* 1*d.*, was attached to the affidavits in support of the application, which shewed a demand, and that a copy of the allocatur had been served on Sydserff, and on each of his bail.

Ball now shewed cause. It does not appear that this recognizance has been duly taken. There is no place named in the body of the recognizance, where it was taken (a). It will consequently be presumed to be taken in the county mentioned in the margin; *Rex v. Austin* (b). If so, as the county in the margin is Middlesex, and the magistrate is distinctly stated to be one of her Majesty's justices of the peace, in and for the county of Surrey, the recognizance has been taken out of his jurisdiction. Then, again, it does not appear that this recognizance has been made a record of this Court; and if not, it cannot be estreated. The case of *Glynn v. Thorpe* (c), shews, that to make it a record, it must be enrolled; but that step has not, in this case, been taken. Another answer to this motion is, that the condition of this recognizance has been fulfilled, by the defendant, Sydserff, appearing, and taking his trial, and undergoing the sentence of the Court. It is true, that the case of *Regina v. Hawdon and Others* (d), is an authority to the contrary; but there the resistance to the application was by the defendant himself, and not, as in the present instance, by one of the bail: and Lord *Denman*, C. J., in delivering the judgment of the Court,

(a) In point of fact, the recognizance had been taken in Surrey, at the Queen's prison, where Sydserff was confined for debt; the stat. 5 & 6 Wm. 4, c. 33, s. 2, allowing it to be taken before a

justice of the peace where the defendant resides.

(b) 8 Mod. 309.

(c) 1 B. & A. 153.

(d) 1 Q. B. 464; See S. C. 1 G. & D. 135; 9 Dowl. 1007.

expressly adverts to that fact. It seems very hard, that parties who enter into a recognizance, conditioned for one purpose, should be held liable, by a construction put upon the terms of an act of Parliament, for the performance of another condition than the one which they have undertaken to fulfil. Lastly, there has been no notice of taxation in this case. The affidavits shew a service of the allocatur, and demand of the amount, but no notice of taxation. [*Patteson*, J.—Is any notice necessary?] By the stat. 5 & 6 Wm. & Mary, c. 11, s. 3, the costs are “to be taxed according to the course of the said Court.” The practice of the Court is regulated by Reg. Gen., T. T., 1 Wm. 4, r. 12, which requires “one day’s notice to be given to the opposite party.” [*Patteson*, J.—Have you any affidavit of no notice?] No: but the other party should come with sufficient materials for the application. [*Patteson*, J.—I do not know that it is necessary that they should shew notice. It must be assumed, that the Master would not have proceeded to tax the costs, unless the proper notice had been given.]

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Rev. in support of the rule. With respect to the first objection, it is true that Sir M. Hale, in his *Pleas of the Crown*, vol. 2, c. 7, says, that justices of the peace cannot take recognizances and examinations out of their county; but then he says (a), “yet quære of recognizances and examinations, for they are acts of voluntary jurisdiction, and therefore, it seems, may be done out of the county, as well as a bishop may grant administration, institution, or orders, out of his diocese: but, indeed, imprisoning of a person for not giving recognizance, or committing a person for a crime, are acts of compulsory jurisdiction, and may not be exercised out of his county.” To the same effect, 2 *Hawk. Pleas of the Crown*, c. 8. In the present case, the recognizance is completely a voluntary act. In *Helier*

(a) p. 51, ed. 1736.

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v. Hundred de Benhurst (a), cited in *Hawk. Pleas of the Crown*, which was an action against the hundred for a robbery committed, and the examination of the party robbed was taken before a magistrate of Berkshire, at his chambers in the Temple; the Court there took the above distinction between a voluntary act and one of a compulsory nature. The ordinary form, in *Burn's Just.*, tit. "*Recognizance*," as also that in use in the Crown Office, does not state where the recognizance is taken; and these are precedents of some value, on a doubtful point. The Court will also make every intendment in favour of the recognizance, as this is a proceeding, not in an inferior Court, but in this Court; as much as the bail-piece is on the civil side. Besides, this is but an irregularity, and should have been taken advantage of before. The recognizance was entered into in March, 1843. These parties cannot, after having reaped the benefit from it, now seek to shew the invalidity of their own proceedings; *The Queen v. The Trustees of Swansea Harbour* (b). But, even supposing that this instrument be a nullity, as is contended, the parties can take advantage of it, when any motion is founded on it, in the Exchequer. [*Patteson, J.*—If it were manifestly a nullity, perhaps this Court would not interfere at all.] It is contended, that the recognizance is perfectly valid; but that, even if there be a doubt, this Court will allow the usual course to be followed, as the parties will be able to urge any objections they may have to offer, when it is sought to put it in force against them in the Court of Exchequer. With respect to the objection, that this recognizance has not been entered of record, the case of *Glynn v. Thorpe* (c), merely shews that the recognizance cannot be treated as a debt, unless it be so. But all that is sought by the present application, is to have the recognizance sent into the Court of Exchequer. For this

(a) Cro. Car. 211.

1 P. & D. 512.

(b) 8 A. & E. 439; See S. C.

(c) 1 B. & A. 153.

purpose, it need not be first entered of record. The steps taken here, are precisely the same as those in *Regina v. Hawdon and Others* (a). The 24th rule, of the New Rules under the new act, 6 Vict. c. 20, orders, that "every recognizance, acknowledged on the removal of an indictment, order, or other proceeding, or to prosecute any information granted by the Court, or for the appearing or answering of any party in the said Court, or for good behaviour, shall, after the acknowledgment thereof, be transmitted to the Crown Office, and filed there."

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[*Ball*. Those rules are of the present year, and after this recognizance was made.]

Rew. At any rate, there is no rule whatever which requires the recognizance to be entered of record, before such an application as this can be made. [*Patteson*, J.—It certainly does not appear, by the New Rule, that any such course is contemplated to be taken. It says, that the recognizance "shall be transmitted to the Crown Office, and filed there." It does not add, "and entered of record;" and I suppose that the former is all that is ever done.] [Master *Barlow* stated, in answer to a question from the Court, that the practice was, as it had always been, only to file the recognizance.] With respect to the liability of the bail to these costs, it arises out of the 3rd section of the 5 & 6 Wm. & M. c. 11, which requires "that the recognizance shall not be discharged till the costs so taxed shall be paid." The question was fully considered in *Regina v. Hawdon and Others* (b), and unless this Court will overrule that decision, it cannot entertain the present objection. With respect to the last point, it is for the other side to shew that any irregularity has been committed, if such be the fact, and not to ask the Court to presume it to have occurred.

(a) 1 Q. B. 464.

(b) 1 Q. B. 464.

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PATTESON, J.—In this case, most of the objections that have been urged against this application have been already answered. It is said, that these recognizances are not enrolled, and if not enrolled, that they are not on record. But granting this to be so, I see no reason for refusing the present application. The practice, as it is stated by the Master, is to file the recognizance, but not to enrol it. That was also the practice before the New Rules; and, if it be necessary to enrol them before the present motion can be made, some rule rendering it so, or some case in which it has been so held, should be shewn. With respect to the liability for costs, that question has been already expressly decided, in the case of *Regina v. Hawdon and Others* (a). As regards the want of notice of taxation, it is for the party alleging the irregularity to point it out. A similar objection might be made in every case where a party objects to a Master's allocatur. The Court will presume that all has been done regularly. The only objection that remains, is that the recognizance has been taken out of the county, for which the magistrate was a justice; and it is contended he had no power, therefore, to take it. The ordinary course is, for the recognizance to be taken before a Judge at Chambers; and no form of recognizance, taken before a justice, occurs, in either Mr. Corner's or Mr. Archbold's works on the practice of the Crown side of this Court. The forms there given, are those before a Judge, and there the words, "at my Chambers," are inserted. It would have been better, and, certainly, more prudent, if the magistrate, on this occasion, had stated it to be taken in the county for which he was acting. But, even supposing it to be doubtful, whether a magistrate can take a recognizance out of his own county, it would rather appear, from the language of the recognizance, that "the parties came before me, a justice of the peace, *in* and for the county of Surrey," that the magistrate, in the present case, was in his

(a) 1 Q. B. 464.

own county, when he took this recognizance. But, however this may be, I cannot think it is a sufficient objection to prevent me from granting the present motion, which is to estreat the recognizances into the Exchequer. Whether the parties can make any defence upon this ground, when before the Court of Exchequer, it is not for me to decide. Whatever may become of the objection in another place, I think I ought not to enter into it now; but must make this rule absolute, and estreat the recognizance.

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Ball applied for time for the parties to pay the amount; and referred to the case of *Regina v. Hawdon and Others* (a), where Lord *Denman* granted a similar application.

PATTESON, J.—You may take a month.

Rule absolute, unless the costs be paid in a month.

(a) 1 Q. B. 464.

Ex parte LE CREN.

PASHLEY moved for a rule nisi for a mandamus to the vicar, churchwardens, and parishioners of St. Stephen, Coleman Street, in the city of London, commanding them to hold a vestry meeting for the purpose of electing a proper person as organist, or to admit Miss Le Cren into that office.

A mandamus will not lie to compel the vicar, churchwardens, and parishioners of a parish, to meet for the purpose of electing an organist to the parish church; although

It appeared by the affidavits in support of the motion,

within the time of living memory, there has always been an organist who has been paid a stipend out of the church rates.

At a vestry meeting convened for the purpose of electing an organist, it was unanimously agreed that the course pursued on a former vacancy should be followed, namely, that a committee of the vestry should select six out of the candidates, who should perform in the parish church each on a separate Sunday, and that one of those six should be elected to the office; but that no vote given for any other than one of the six candidates should be received: *Held*, that this mode of proceeding was not unreasonable, and that the Court would not grant a mandamus to admit to the office a person in whose favour the greatest number of votes had been tendered, but who was not one of the six candidates.

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that from a time beyond living memory, there had been an organist for the parish of St. Stephen, who had been regularly paid a fixed salary out of the church rates: that in the event of a vacancy occurring, the candidate for the office was elected by the rated inhabitants of the parish in public vestry, by a shew of hands, or by a poll, if demanded: that in the month of April, 1844, a vacancy having occurred, a vestry meeting was held on the 19th; at which it was agreed, in pursuance of the precedent of the course held upon a former vacancy in 1827, that a committee should be appointed, who should reduce the number of candidates to six; and that then each of those six should perform once on a separate Sunday, and then be elected by shew of hands, or poll, if demanded. The minutes of this vestry were confirmed at a subsequent meeting duly convened and held on the 20th of June, and the names of the six candidates were there stated, among whom Miss Le Cren was not included. It was then moved that she be included; but on a shew of hands, the motion was lost by a majority of fifty-three against twenty-one. A written demand for a poll on her behalf was then made. A poll was then taken for the other five candidates (one having withdrawn); but the votes offered for Miss Le Cren were refused to be recorded, and marked only as tendered. On the close of the poll, the candidate who had the greatest number of votes, and was declared to be duly elected, had only seventy-six votes; whilst Miss Le Cren, the votes in whose favour were only marked as tendered, had eighty-three. Miss Le Cren had since offered to perform the duties of organist, but had been denied; and a demand of a quarter's salary on her behalf (a sum having been voted by the vestry for the payment of the organist) had been made to the churchwardens and refused.

Under these circumstances it was submitted, that if the Court should hesitate to grant a mandamus, calling upon the vicar, churchwardens, and parishioners, to admit Miss Le Cren to the office of organist; yet that the writ might

properly issue, calling on the vicar, churchwardens, and parishioners, to proceed to the election of an organist. Organs are not of very ancient date, and, therefore, authorities are not likely to be found in the books upon the subject; but analogous decisions are found, and, it is submitted, that the major part of the inhabitants may clearly lay a rate to defray the expenses incident to maintaining the organ and paying the organist. It is laid down in 2 *Roll. Abr.* tit. "*Prohibition*," (K), pl. 4, "Si le plus part del parishioners d'un parish ou la sont 4 bells agreee que la serra fait un fifth bell, et ceo font accordant, et font un rate pur payment pur luy; ceo liera le meinder parte del parishioners coment que ils ne agree al ceo, car auterment ascun obstinate persons poient hinder ascun chose intend et que est fit pur le ornament del Esglise:" and, in the case of *The Churchwardens of St. John Margate v. The Parishioners, Vicar, and Inhabitants of the Same* (a), a faculty for erecting an organ was held to be good. In the present case, the organ has been erected beyond the time of living memory. If the erection of an organ be a legitimate expense, to be paid out of church rates; surely the expense of keeping it up, and paying the organist, must be so too. According to *Prideaux's Duties of Churchwardens*, pp. 176, 7, ed. 1843, a charge for an organist, as part of the church rate, is valid, if sanctioned by a majority of the vestry. The parishioners who pay the salary have, therefore, a right to have the election duly conducted. In the present case, a poll has been substantially refused to Miss Le Cren; for, although the votes in her favour were taken, they were not received and treated as actual votes, but marked merely as votes tendered. Miss Le Cren had the majority of votes in her favour on that occasion; and it cannot be denied that the majority of the inhabitants have the right to bind the rest, and that a poll is an incident to the election of every parish office;

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(a) 1 Hagg. C. R. 198.

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Campbell v. Maund (a), *Regina v. The Rector, &c. of Lambeth* (b), *Regina v. The Vestrymen, &c. of St. Pancras* (c). Here the will of the majority of the electors, who were in favour of Miss Le Cren, has been disregarded, and the election is consequently void. [*Patteson, J.*—The difficulty that I feel is, whether the office of an organist be an office known to the common law. Whether, even if it be conceded that the expenses may be paid out of a rate, the parishioners may not, if they choose, refuse to have an organist at all.] At all events those, who by the existing arrangements are liable to pay the salary, are entitled to vote in the election. Although the place of organist be not in strictness what Lord *Coke* would have termed an office; yet the Court will not, on that account, refuse to grant a mandamus; *Regina v. The Governors of the Darlington Grammar School* (d). There the Court granted a mandamus to the governors of a foundation school to reinstate a schoolmaster, who was an officer removable by the terms of the charter, “at their sound discretion;” and the question is now pending on the validity of the writ, in the Court of Exchequer Chamber (e).

Cur. adv. vult.

PATTESON, J.—This was an application for a mandamus to the vicar, churchwardens, and parishioners of St. Stephen, Coleman Street, to proceed to the election of an organist, or to admit Miss Le Cren into that office.

On looking at the authorities, I cannot find any which go the length of saying that I can issue such a writ for the election of an organist. The utmost that Lord *Stowell* decided in the case of *The Churchwardens of St. John's Margate v. The Parishioners, Vicar, and Inhabitants of the*

(a) 5 A. & E. 865; See S. C. 4 P. & D. 66, note (b).
1 N. & P. 558. (d) Not yet reported.

(b) 8 A. & E. 356; See S. C. (e) Judgment has since been
3 N. & P. 416. given for the defendants in that

(c) 11 A. & E. 15; See S. C. case.

Same (a) was, that he would grant a faculty for erecting an organ, because the majority of the parishioners might direct a rate for keeping it up, and paying the organist. That is the utmost extent to which that case goes, and I cannot find that the other authorities carry it any further. I therefore think it is impossible that a mandamus should go to the inhabitants generally, to elect an organist. The only case I have found in which a writ was issued to the inhabitants at large is *Rex v. Wix (b)*. There the parishioners were commanded to meet and elect churchwardens, but that is a very different matter, and I can find no case which says that the Court can issue a mandamus for a purpose like the present.

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In this case, it is true, that there has been from time to time a vote for the expenses of the organist out of the church rate; but I see nothing to prevent the parishioners from rescinding their appointment of organist, and determining for the future to have none.

With respect to the other alternative of the motion, I do not think this is a case in which, even if I had the power, I ought to interfere. The facts appear to be, that at the first vestry meeting a committee was appointed to reduce the number of candidates to six, and that each of those six should perform the service on a separate Sunday. Sixty candidates offered themselves, and they were reduced by the committee to six. Miss Le Cren was not amongst the six. It appears that one afterwards retired. At a subsequent meeting of the vestry, the minutes of the former meeting at which this resolution was carried unanimously, were confirmed without objection; and then an election took place, confined, it is true, to those five; and the successful candidate declared duly elected. I collect from the affidavits that this was the mode of proceeding adopted on the occasion of the last vacancy. I cannot see that this was an unreasonable mode of conducting the election; or that it was not competent, under such an

(a) 1 Hagg. C. R. 198.

(b) 2 B. & Ad. 197.

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arrangement, to say that no votes should be given for any but the six selected candidates, and to declare that the votes given for any other person were thrown away.

Rule refused.

—◆—
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To a writ of allocatur exigent the sheriff returned, that at his county Court held at, &c., in and for the county of, &c., on, &c., the said A. W. was the fifth time demanded and did not appear; and that "because her Majesty's coroners of the said county were and each of them was absent on the said fifth demand so made as aforesaid, judgment of outlawry against the said Augustus Wedderburn could not be pronounced," &c. *Held*, that the return was bad.

THIS was a rule calling on the sheriff of Yorkshire to shew cause why his return to a writ of allocatur exigent issued in the above cause, should not be quashed, and an attachment be issued against him for his contempt in having made an insufficient return.

The writ of allocatur exigent which had been issued in the above cause, was dated the 31st of January, 1844, and was in the usual form, and returnable on the 8th of May, 1844. The sheriff had made the following return:

"By virtue of this writ to me directed, at my county Court, held at the Castle of York, in and for the county of York, on Wednesday the 21st day of February, in the seventh year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the Faith, the within named Augustus Wedderburn was the third time demanded and did not appear: and at my county Court held at the Castle of York, in and for the county of York, on Wednesday the 20th day of March, in the year above said, the said Augustus Wedderburn was the fourth time demanded and did not appear: and at my county Court, held at the Castle of York, in and for the county of York, on Wednesday the 17th day of April, in the year above said, the said Augustus Wedderburn was the fifth time demanded and did not appear: and because her Majesty's coroners of the said county were and each of them was absent on the said fifth demand so made as aforesaid, judgment of outlawry against the said Augustus Wedderburn

could not be pronounced: and there will not be another county Court held in and for my said county until the 15th day of May in the year above said, being after the day of the return of this writ."

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"The Answer of TIMOTHY HUTTON, Esq.,
"Sheriff."

The affidavits in opposition to the present motion set out a writ of allocatur proclamations, dated the 31st of January, 1844, and returnable also on the 8th of May, 1844. They also shewed that the sheriff had been unable to affix copies of one of the proclamations to the church door, &c. one month at least before the quinto exactus, as required by the act of Parliament; because the writ was only handed over to him by the previous sheriff on his going out of office on the 21st of February, 1844, and the first county Court which the present sheriff held afterwards, and at which he made the first proclamation under the writ of allocatur proclamations, was, on the 20th of March, consequently less than a month before the quinto exactus, which was the 17th of April. The affidavits also stated that the sheriff had given notice to the coroner to appear, who had, however, neglected to do so.

Crompton shewed cause, and contended, first, that no writ of attachment would lie against the sheriff, as even supposing the return to be bad, the plaintiff had not sustained any damage by his default in this respect; the rest of the proceedings being void by reason of the defect disclosed in the affidavits (*a*). Secondly, he submitted that the return was in substance good. The return is, that no judgment of outlawry could be pronounced by reason of the coroners being absent on the quinto exactus. This is the only return that the sheriff could in truth make. It is

(*a*) He cited *Taylor v. Waters*, ment is omitted, as the Court 2 B. & C. 353; See S. C. 3 D. & gave no judgment on it. R. 575. This part of the argu-

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not a part of his duty to pronounce judgment of outlawry. It is for the coroner of the county to do so, and it is so laid down in *Jervis on Coroners*, p. 35. In *Watson on Sheriffs*, p. 157, it is said, "the sheriff may return (if the fact be so) that the coroners were absent, or that only one coroner was there, who refused to pronounce the outlawry:" and for this position, *Dalton on Sheriffs*, p. 240, is cited. On referring to that work, the form is given which is very similar to the one now used: "Et quod ob defect. J. W. and W. R. coron. Dom. regis comitat. prædict. ulterius procedere non potui." The coroner is an officer of this Court as much as the sheriff; and this motion should have been to fine the coroner for not attending, instead of seeking to attach the sheriff. In *Jervis on Coroners*, p. 36, it is said, that "one of the coroners must be personally present at the county Court. If he fail to attend, he is liable to fine and imprisonment."

Pashley, contra. It is not disputed that the coroner alone could give the judgment. It is one of the many things which the coroner was to record: *Britton 'de Coroners,'* fol. 3, b; "Nous volons que coroners soient en chescun countie"—"a porter record de plees de nre corone,"—"et de outlagaries." *Termes de la Ley.* tit. "Utlary." The statute 33 Hen. 8, c. 13, plainly shews the uniform course that such judgments are given by the coroner. For that statute, in appointing coroners for Cheshire, seems but declaratory of the duties performed by them in other counties; and it expressly declares that the coroners so to be appointed shall be bound to sit with the sheriff at his shire Court "to give judgments upon outlawries, and to do all other things as appertaineth." It follows that the coroners may so conduct themselves, either by negligence in not attending to perform their duty, or by refusing to give the judgment when present, as fully to exonerate the sheriff. But this return names no supposed defaulter, and does not give the plaintiff any right to apply to the Court against any coroner. The

several forms given in *Dalton on Sheriffs*, p. 240, to which reference has been made, are all distinguishable. The first of those returns is "Et quod ob defect. J. W. and J. R., coron. dom. regis comitat. prædict. ulterius procedere non potui." There the sheriff returns and records in direct terms *the default* of two coroners whom he names, and so gives the party a remedy against those who were in default. *Dalton's* observation on the return is "And then upon this return the coroners will be fined for every writ, unless they can make a good excuse." The second form in *Dalton* equally fails to justify the present return. It is, that "J. M. et J. G. coronator. dom. regis com. præd. solemniter exacti non venerunt;" and it concludes that he, the sheriff, "ob eorum defectum ulterius ibidem procedere non potuit." So in the other instances there given; in one the coroner *refused* to give judgment; in another, sufficient time for holding the fifth county Court had not elapsed before the return of the exigent: in the last, the sheriff shews that it was impossible to give a judgment of outlawry. In all the others, he names the individual defaulters in his return. The omission to name the coroners who made default is a fatal objection.

There are several other fatal defects in this return. It states, that the coroners were "absent on the fifth demand." How absent, whether from home or from the Court, is not stated; absent is a word of relation: "absens absentem auditque videtque:" and its meaning is wholly undefined here. Again, "on" the fifth demand: what does "on" mean? The Court said in *Reg. v. Brownlow* (a), with reference to the words "instantly died," that they did not know what was meant by "instantly:" "possibly five minutes, or an hour, some time on the succeeding day, or even a longer time." "On the fifth demand," is equally indefinite as to time. Even "immediately," may mean after a lapse of several

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(a) 11 A. & E. 119, 127; See S. C. 3 P. & D. 52; 8 Dowl. 157.

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hours; *Thompson v. Gibson* (a), *Page v. Pearce* (b). Again, the phrase "*her Majesty's coroners*" is wholly uncertain. The words "*her Majesty*" may mean the Queen Dowager, or some other royal person. The phrase itself "*Majesty*," as applied to an earthly Sovereign, is hardly known to the law. Queen Elizabeth's courtiers spoke of their Sovereign as her Highness. In a return to an exigent, the greatest certainty being required, the Sovereign ought to be named. Many instances are given in *Roll. Abr.* tit. "*Utlagarie, error utlagarie*." The words "*anno regni domini nostri Jacobi*," &c., omitting the word "*regis*," was held bad; *Ib.* pl. 6. A return "*anno 44 reginæ*" omitting "*Elizabethæ*," was held bad; *Ib.* pl. 7; although the Courts take judicial notice of the duration of each reign, and there was only one Queen, Elizabeth, who had reigned for forty-four years in England. The strict rule in these matters was acted on in *Rex v. Wilkes* (c). In *Fitzherb. Abr.* tit. "*Errours*," pl. 57, the following case is cited: "*Home utlag. de felon. assign. pour erreur que al cap. ag. vers luy le vic. ret. qd non invenit, ou il duist av. ret. qd non est inventus, & ce fuit aiudg. pur erreur*." And in a recent and somewhat similar case, the Court of Exchequer held that a return was bad, and made absolute a rule for attaching the sheriff, where, in his return to a ca. sa., the sheriff stated that the defendant was not *to be found*, instead of was not *found*, in his bailiwick; *Rex v. Sheriff of Kent* (d). That case is a strong authority to shew that this writ of attachment should absolutely go.

PATTERSON, J.—It would seem from the authorities which have been cited, that the coroner's neglecting to attend the Court is a sufficient excuse for the sheriff, if that fact be properly stated in the return. But here the return does

(a) 8 M. & W. 281; See S. C.
 9 Dowl. 717.

(c) 4 Burr. 2527.

(b) 8 M. & W. 677; See S. C.
 9 Dowl. 815.

(d) 2 M. & W. 316; See S. C.

5 Dowl. 451.

not name the coroners, or state any neglect on their part to attend. It merely states, that "because her Majesty's coroners of the said county were and each of them was absent on the said fifth demand, judgment of outlawry against the said Augustus Wedderburn could not be pronounced." Why does it not say that they were the coroners "of our Lady the Queen," or give their names? I think the return is informal, but the sheriff may have leave to amend, on payment of costs.

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Rule accordingly (a).

(a) The permission to amend in point of fact made, as an
was only as to the formal part of arrangement was come to be-
the return. No amendment was tween the parties.

COURT OF COMMON PLEAS.

Michaelmas Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

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MUMMERY v. PAUL.

Case. That before the committing the grievances, &c. the defendant carried on business as, &c., at a messuage situate, &c., and was possessed of a lease of the said messuage, and of certain fixtures and utensils of trade therein being: and that thereupon the plaintiff, at the request of the defendant, bargained with the defendant to buy the goodwill of the business, and the lease of the house and the fixtures, &c., and that the defendant, by falsely and

CASE. That before and at the time of committing the grievances hereinafter mentioned, the defendant carried on the trade and business of a potatoe salesman, at a messuage and premises situate and being, &c., and was possessed of a lease of the said messuage and premises for a certain term of years, to wit, twenty-one years from the 25th day of March, in the year of our Lord 1827, and was also possessed of certain fixtures then fixed and being in and upon the said messuage and premises, and of a horse, cart, van, utensils in trade, goods and chattels. And thereupon heretofore, to wit, on, &c., the plaintiff, at the request of the defendant, bargained with the defendant to buy of him his interest in the said lease, and the said fixtures, horse, cart, van, utensils in trade, goods and chattels, as also the goodwill of the said trade and business, at and for a certain price and sum of money, to wit, 700*l*. And the defendant by then falsely, fraudulently, and deceitfully pretending and representing to the plaintiff that the amounts received for commission in the fraudulently pretending and representing that the net profits of the business amounted to, &c., sold the business, &c. to the plaintiff, and the plaintiff then paid for the same the sum of, &c.; whereas in truth, the net profits of the business amounted to a much less sum, to wit, &c. Plea, not guilty: *Held*, after verdict, that upon these pleadings the defendant might dispute the fact of the representation being made, as well as its falsity.

course of the said business had been and were at the rate of 900*l.* a-year, and that the net profits of the said business had been and were at the rate of 500*l.* a-year, then bargained for and sold to the plaintiff the said lease, fixtures, horse, cart, van, utensils in trade, goods and chattels, and the said goodwill, at and for the said sum of 700*l.* And the plaintiff afterwards, to wit, on the day and year aforesaid, paid the defendant for the same the said sum of 700*l.*, that is to say, by then paying to the defendant the sum of 400*l.*, and by then delivering to the defendant three promissory notes in writing, each made by the plaintiff and Thomas Mummery, and dated the 27th day of May, in the year of our Lord 1842, and payable to the order of the defendant; one for the payment of the sum of 103*l.* 15*s.*, at nine months after the date thereof; one other for the payment of the sum of 106*l.* 5*s.*, at fifteen months after the date thereof; and the other for the payment of the sum of 107*l.* 10*s.*, at eighteen months after the date thereof. Whereas in truth and in fact, the amounts received for commission in the course of the said business, had not been nor were at the rate of 900*l.* a-year; but had been and were much less, to wit, 400*l.* a-year: and whereas in truth and in fact, the net profits of the said business had not been nor were at the rate of 500*l.* a-year, but had been and were much less, to wit, 50*l.* a-year; as the defendant, at the time of making the said false and deceitful representation, well knew. And the defendant, by means of the premises on the day and year aforesaid, falsely and fraudulently deceived the plaintiff in the said sale; and thereby the said lease, fixtures, horse, van, cart, utensils in trade, goods and chattels, trade and business, have become and are of no use or value to the plaintiff; and the plaintiff hath sustained great trouble and expense, to wit, an expense of 200*l.* in and about carrying on the said trade and business, and endeavouring to dispose of the same; and hath been prevented from earning his livelihood, and from acquiring divers great gains and profits which he

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might and otherwise would have acquired, for a long time, to wit, from thence hitherto, during all which time he the plaintiff has been and was necessarily employed in carrying on the said trade and business, and endeavouring to dispose of the same.

Plea, not guilty; whereupon issue was joined.

This cause was tried at the sittings after Trinity Term last, before *Tindal*, C. J. Upon the trial, it appeared that his Lordship had left it to the jury to say, first, whether the defendant made the representations mentioned in the declaration; and secondly, whether, supposing that he made them, he knew them at the time to be false. After verdict for the defendant;

Shee, Serjt., moved for a new trial, on the ground of misdirection (a). By Reg. Gen., H. T., 4 Wm. 4, pt. 2, r. IV., "in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement," &c. Here, it is submitted, the representation made by the defendant is merely matter of inducement to the wrong complained of, namely, the falsity of the representation. It is true that there is a case at nisi prius of *Spencer v. Dawson* (b), where Mr. Baron *Parke* is reported to have ruled, that in an action on a warranty of a horse, the plea of not guilty put in issue not only the soundness, but the warranty; and another case also in the same reports, of *Mash v. Densham* (c), where Mr. Baron *Alderson* allowed an amendment of the alleged misrepresentation in an action on a warranty of a horse, where the only plea was not guilty. But in the case of *Taverner v. Little* (d), which is a leading case on this subject, and in which all the former cases were

(a) The motion was also made on the ground of the verdict being against evidence; and, on this latter ground, a rule nisi was obtained.

(b) 1 M. & Rob. 552.

(c) Id. p. 442.

(d) 5 Bing. N. C. 678; See S. C. 7 Scott, 796.

reviewed, it was held, that in case against the defendant for negligently driving his cart and horse against plaintiff's horse, the defendant could not, under the plea of not guilty, shew that he was not the person driving, and that the cart did not belong to him. [*Tindal*, C. J.—In that case there was a distinct and separate allegation that the defendant was possessed of the cart and horse. Here the representation is part of the wrongful act. If it had been laid in the declaration as inducement, then the argument might have had some weight.] It is submitted, that the object of the pleading rules being to acquaint the parties with the points which will be really contested; it is within the purview and intent of those rules, that the plaintiff should know whether the defendant means to deny the fact of the representation, or its falsity. [*Maule*, J.—Where the action is for a nuisance, by carrying on an offensive trade, the rule says, the plea of not guilty shall operate as a denial that the defendant carried on the trade “in such a way” as to be a nuisance, &c. That shews that it would put in issue both the questions; whether the defendant carried on the trade, and whether it was a nuisance.]

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TINDAL, C. J.—I can see no ground for the objection sought to be raised. As I read the declaration, both the act done and the representation are parts of the wrongful act complained of. The present case is perfectly distinguishable from those where facts are stated simply by way of inducement.

COLTMAN, J.—I think the present case is similar to the case of slander; where the plea of not guilty operates as a denial of speaking the words, and of speaking them maliciously, and in the sense imputed.

Rule refused, on the ground of misdirection; but granted as against evidence (a).

(a) See *Dunford and Others v. Trattles*, ante, vol. 1, p. 554; S. C. 12 M. & W. 529.

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BECKETT v. BRADLEY.

In covenant upon a deed demising the dividends from railway shares, on payment of a certain annual rent, the declaration stated that the plaintiff was possessed of or entitled to certain railway shares, and then set out the material portions of the deed, (which also recited that the plaintiff was possessed of the railway shares), and the defendant's covenant to pay the rent, and alleged a breach of that covenant. The deed was set out on oyer. The defendant pleaded that the plaintiff was not possessed of or entitled to the shares: *Held*, upon special demurrer, that the defendant was estopped by the deed from pleading the above plea; notwithstanding the independent substantive allegation in the declaration that the plaintiff was possessed of the shares; and that it was not necessary to reply the estoppel, which sufficiently appeared upon the pleadings.

COVENANT. The declaration stated, that whereas, heretofore, and at the time of the making of the deed hereinafter mentioned, the plaintiff was a member of the North Midland Railway Company, and as such was possessed of, or entitled to, certain shares therein, to wit, equivalent to twenty shares of 100*l.* in amount, with the dividends payable thereupon half-yearly, or otherwise, when and as the same should be thereafter declared and made by the said company. And whereas also, heretofore, and before the commencement of this suit, to wit, on the 20th of November, 1841, by a certain deed purporting to be an indenture, bearing date, &c., and made between the plaintiff of the one part, and the defendant of the other part (profert) it was recited, that the plaintiff, at the time of the making of the said deed, was a member of the North Midland Railway Company, and as such was possessed of, or entitled to, certain shares therein, equivalent to twenty shares of 100*l.* each in amount, with the dividends payable thereupon half-yearly or otherwise, when and as the same should be thereafter declared and made by the said company. And it was therein also recited, that the plaintiff had agreed with the defendant to demise to him for the term of ten years, to be computed from the 1st of July then last past, the dividends to be declared and made upon the said shares within the said term, after the day of the date of the said deed, at and under the reserved and yearly rent of 100*l.*, payable half-yearly, and under and subject to the proviso, covenants, stipulations, and agreements thereafter contained. And it was by the said deed witnessed, that in pursuance and performance of the said agreement, and for carrying the same into effect, and also in consideration of the yearly rent, covenants and agree-

ments thereafter reserved and contained, and by the defendant, his executors, administrators, and assigns, to be respectively paid, done, and performed, she, the plaintiff, had demised and set, and by the said deed did demise and set unto the defendant, his executors, administrators, and assigns, all such dividends as should, from and after the date and execution of the said deed, during the term of ten years thereinbefore and thereafter mentioned, arise, accrue, be made, declared, or grown due or payable half-yearly, or otherwise, from, upon, or in respect of twenty shares of 100*l.* each in amount, in the said undertaking or concern of the North Midland Railway Company, and all the power and authority of the said plaintiff to demand, recover, and receive and give effectual acquittances, releases, and discharges for the same dividends, and every or any of them; to hold the same for the term of ten years, from the 1st of July then last past: yielding and paying therefore, during the said term, unto the plaintiff, her executors, administrators, or assigns, the clear yearly rent or sum of 100*l.* of lawful English money, by two equal half-yearly payments, on the 12th day of February, and the 12th day of August in each and every year, without deduction or abatement. The declaration set out a proviso in the deed, that if the said yearly rent or sum of 100*l.*, or any part thereof, should be in arrear or unpaid by the space of thirty days, it should be lawful for the plaintiff, her executors, administrators, or assigns, to re-enter to the said dividends, and the same to have again, receive, retain, repossess, and enjoy, as in her and their former estate, and thereupon and from thenceforth to vacate and determine the said deed, or to take and give credit in account for the amount of the dividends, when and as the same should be received, or otherwise to act in the premises as to the plaintiff, her executors, administrators, or assigns, should seem meet. The declaration then proceeded to set out a covenant by the defendant to pay the said rent, and alleged a breach of that covenant.

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The deed was set out upon oyer.

The defendant pleaded that the plaintiff, at the time of the making of the said deed, in the said declaration mentioned, was not possessed of, or entitled to, shares in the North Midland Railway Company, equivalent to twenty shares of 100*l.* in amount, with the dividends payable thereupon, in manner and form, &c.

Special demurrer, assigning for cause that the defendant was estopped by the deed from pleading the above plea; and also that the plea attempted to put in issue matter of inducement not in any way connected with, or forming part of, the ground of action; and also that the matter on which the defendant attempted to take issue was immaterial. Joinder in demurrer.

Channell, Serjt., to support the demurrer. The substance of this contract is an undertaking to farm shares in the North Midland Railway Company for ten years, at a certain specified rent, and the deed which is set out on oyer shows a regular demise of the dividends to accrue from those shares, with a proviso for the determination of the demise if the rent be not duly paid. This, therefore, is the ordinary case of lessor and lessee, and, consequently, the lessee is estopped from disputing his lessor's title. It was unnecessary for the plaintiff to allege in the introductory part of the declaration that he was possessed of the shares, since it would have been sufficient for him to declare simply on the deed. [*Mauk*, J.—Can you show the estoppel without pleading it?] It is not necessary to plead an estoppel, where it appears on the face of the pleadings that the demise was by deed indented (a). In *Litt. Ten.* c. 7, s. 58, it is said, “it is a good plea for the lessee to say, that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the

(a) See *Veale v. Warner*, 1 Wms. Saund. 323, b.

lessee to plead." [*Maule, J.*—According to the passage referred to, there was an entry there by the lessee.] It is submitted, that an entry by the lessee would not be necessary to give him a right to the term, or the lessor a right to rely on an estoppel. An allegation of entry by the lessee is usual in pleading, but it is not a traversable averment. It is clear from the authority of *Bowman v. Taylor* (a), that there may be an estoppel by matter of recital. Upon the whole, therefore, it is contended, that the defendant was estopped from denying that the plaintiff was possessed of the shares. [He argued, also, that the traverse was bad, upon other grounds, to which it is not necessary to advert.]

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Byles, Serjt. (Hoggins with him) contra. The plaintiff has taken away from himself the right to rely upon an estoppel, by putting on the record a substantive and independent allegation that he was possessed of the shares, which the defendant is not bound to admit. In *Palmer v. Ehins* (b), it appeared that there was matter which could not have been put in issue if the party had properly pleaded; but the Court said that the jury might find the truth, notwithstanding the indenture. [*Tindal, C. J.*—Could not the plaintiff have replied the indenture in this case? and, if so, may he not, when the indenture appears on the record, simply demur?] If the plaintiff was not possessed of the shares, he had no right to demise them; and fraud may be pleaded, notwithstanding the strongest estoppel. Then, again, *Bowman v. Taylor* (c) is not decisive to shew that a recital will operate as an estoppel. The declaration there began by stating the indenture, which distinguishes that case from the present. In this recital there is no allegation that the property mentioned in it is

(a) 2 A. & E. 278; See S. C.
 4 N. & M. 264.

(c) 2 A. & E. 278; See S. C.
 4 N. & M. 264.

(b) 2 Lord Raym. 1550.

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the same as that mentioned in the subsequent part of the declaration. [*Maule, J.*—It is either the same, or different; if the same, the estoppel applies; if different, the allegation is as immaterial as if the plaintiff had said that he was possessed of a horse, or any other article of property.]

PER CURIAM.

Judgment for the Plaintiff.

BURGESS v. BEAUMONT.

The plaintiff declared upon a breach of contract by which the defendant had agreed to allow her 600*l.* a-year for her maintenance and instruction, until he should require her services as a governess of his children. The defendant pleaded that he entered into the promise and agreement in the belief, and on the representation by the plaintiff, that she was an honest and moral person, and a fit and proper person for the said situation; that before any breach of the

ASSUMPSIT. The declaration stated, that before the making of the promise thereafter next mentioned, the plaintiff had been, and was a governess and teacher, engaged and employed by the defendant, and had resided in the house of the defendant as such governess and teacher of the defendant's children, and had then quitted such residence and employment; and that afterwards, to wit, on the 3rd day of February, 1838, in consideration that the plaintiff, at the special instance and request of the defendant, would, when she should be thereafter required by the defendant, resume the said situation and employment of governess and teacher of his, the defendant's, children, and would again reside with the defendant and his family as such governess and teacher; and, in the meantime, and until she should be so required as aforesaid, would not contract or enter into any other engagement without the consent and permission of the defendant, and would take and use due pains and diligence to improve and instruct herself in various arts, sciences, and accom-

promise, the defendant discovered that the plaintiff had become and was an immoral and dishonest person, and wholly unfit and improper for the said situation, and a person whom it would have been very improper and wrong for the defendant to employ as governess of his children; and that he therefore rescinded the contract, and gave her notice thereof: *Held*, upon special demurrer, that the plea was bad, as being too general and uncertain.

plishments, and for that purpose would hire, engage, and employ divers masters and professors, he, the defendant, promised the plaintiff, that until she should be so required by him to resume the said situation and employment of governess and teacher of his, the defendant's children, he, the defendant, would make and grant to the plaintiff a large, sufficient, and liberal allowance for her maintenance and expenses, and would supply her with sufficient means and money as well for that purpose as for the hiring, engaging, and paying such masters and professors as aforesaid, and acquiring such accomplishments and knowledge as aforesaid, that is to say, to the amount in the whole of a large sum, to wit, 600*l.* for each and every year from the time of making such promise, until she, the plaintiff, should be so required to resume the said situation and employment as aforesaid. And the plaintiff says, that she, confiding in the promise of the defendant, was, from the time of the making thereof, continually until the commencement of this suit, ready and willing, on being so required as aforesaid, to have resumed the said situation and employment of a governess and teacher of the children of the defendant, and to have gone to reside with the defendant and his family as such governess and teacher; but the defendant did not, during all that time, require her so to do; and that the plaintiff hath not, during all that time, contracted or entered into any other engagement; and did, during all that time, take and use due pains and diligence to improve and instruct herself in various arts, sciences, and accomplishments; and did, at a great cost and expense, hire, engage, and employ divers masters and professors to teach and instruct her in such arts, sciences, and accomplishments; and paid them large sums of money for and in respect of such teaching and instruction. Breach: that the defendant, wholly disregarding his promise, did not, nor would, after the making thereof, and before the commencement of this suit, make to the plaintiff such large, sufficient, and liberal allowance as aforesaid, or any

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allowance whatever; and did not, nor would, supply her, the plaintiff, with sufficient or any means or money for her maintenance and expenses, or for the hiring and paying of such masters and professors as aforesaid, and acquiring such arts, sciences, and accomplishments as aforesaid; and did not, nor would, pay or allow her, the plaintiff, the said annuity or sum of money for each and every year, from the time of making the said promise, or any part thereof, &c.

Plea, that the defendant entered into the said promise and agreement in the belief and on the representation by the plaintiff that she was a moral and honest person, and a fit and proper person in that behalf for the situation and employment mentioned; and that before any breach of the promise, to wit, on the said third day of February, 1838, he discovered, and the fact was, that the plaintiff had become, and then was, an immoral and dishonest person, and wholly unfit and improper for the situation and employment aforesaid, and a person whom it would have been very improper and wrong for him, the defendant, to employ as the governess and teacher of his said children, or any of them; wherefore he, the defendant, to wit, on the day and year last aforesaid, wholly rescinded the said promise and agreement in the said declaration mentioned, as he lawfully might for the cause in this plea mentioned, and, to wit, then gave the plaintiff notice thereof. Verification.

Special demurrer, assigning for cause that the plea was too general and uncertain, and that the charge conveyed in it was so indefinite, that she did not, nor could know in what way it would be attempted to be proved.

Joinder in demurrer.

Talfourd, Serjt., in support of the demurrer. The plea is clearly bad. It is impossible to distinguish it in principle from those cases of slander and trespass for false imprisonment, where it has been held that it is insufficient to set up

a general charge against the character of the plaintiff. The defendant ought to have stated specifically the instances of dishonesty or immorality on which he meant to rely, so that the plaintiff might have been prepared to meet such accusations. The word "dishonest" may imply many things. It may involve a charge of theft, or forgery, or even of unchastity; and the word "immoral" is quite as vague. Many people might consider the plaintiff an immoral person if she went to a play or an opera. In *JAnson v. Stuart* (a), which was an action against the *Morning Post* for a libel, in publishing of the plaintiff that he was a swindler, the defendant pleaded that the plaintiff had been illegally, fraudulently, and dishonestly concerned and connected with, and was one of, a gang of swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons; but the Court held that such a plea was too general, and that it should state the particular instances of fraud by which the defendant intended to support it. So in *Jones v. Stevens* (b), which was also an action for a libel, the Court of Exchequer unanimously held (c), after time taken for consideration, that general evidence of the plaintiff's bad character and ill repute in his business as a practising attorney could not be admitted, either to contradict the usual allegation in the declaration that the plaintiff carried on his business with great credit and reputation, with a view to mitigating damages on the general issue, or in support of averments in the defendant's pleas of justification that the plaintiff was a disreputable professor and practitioner in the law. Again, in *Mure v. Kaye* (d), it was decided that a plea justifying an arrest by a private person, on suspicion of felony, must set out the causes of suspicion, in order that the Court may judge of their reasonableness. (He was then stopped by the Court).

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(a) 1 T. R. 748.

v. *Walter*, 2 Campb. 251.

(b) 11 Price, 235.

(d) 4 Taunt. 34.

(c) Overruling *Earl of Leicester*

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Byles, Serjt. (Sir *T. Wilde*, Serjt., was with him) contra. It is submitted, that the rules of pleading applicable to actions for libel and slander, do not extend to cases where the action is brought on a contract. In *Young v. Murphy* (a), the plaintiff declared for a breach of promise of marriage, to which the defendant pleaded, that after his promise he discovered that the plaintiff, being unmarried, had committed fornication with some person or persons to the defendant unknown, and had been delivered of a bastard child; and this Court held the plea to be sufficient. In the present case, the plaintiff is alleged in the plea to have represented that she was an honest, moral, and fit person for the situation of governess; and, if she were in any way unfit, that would be an answer to the action. [*Maule*, J.—Suppose the plaintiff had become blind?] If so, that circumstance might have afforded a good defence. [*Tindal*, C. J.—Then the defendant should have said so, and the plaintiff might have called an oculist to disprove the charge of blindness. *Maule*, J.—There is no warranty of fitness by the plaintiff, and the plea does not say that the representation was false with the plaintiff's knowledge. If a horse be sold without a warranty, in an action brought to recover the price, it would be no answer to say that the defendant bought it in the belief and on the representation that the horse was a sound horse?] In an action for a breach of warranty of a horse, it is not usual to set out the nature and degree of the unsoundness.

TINDAL, C. J.—I think that the plea is a great deal too general. The plaintiff could not have come into Court, if she had not demurred to the plea, without witnesses to prove what her conduct had been every day from the 3rd of February, 1838; and she would have been left in doubt whether it was her honesty, her morality, or her fitness which was to be attacked.

(a) 3 Bing. N. C. 54; See S. C. 3 Scott, 379.

COLTMAN, J.—I also think the plea is bad, and that the present case falls within the principle of those which have been cited on the part of the plaintiff.

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MAULE, J.—I am of the same opinion.

ERLE, J.—The plea is bad, because it does not give the plaintiff notice of what she is to disprove.

Judgment for the Plaintiff.

RUSSELL v. KNOWLES.

DOWLING, Serjt., moved for a distringas in this case. The affidavit in support of the application, which was made by the clerk to the plaintiff's attorney, stated that the deponent had tried to effect a personal service of the writ of summons, on many occasions, and that he had called several times, for that purpose, at No. 10, Buckingham Street, Adelphi, being the office of the defendant, as the deponent believed, from the circumstance, that letters, which had been addressed to the defendant there, had been answered by him. The affidavit also stated three several calls and appointments at the said office, which were not kept by the defendant.

An affidavit of service of a writ of summons at a defendant's office, does not disclose a sufficient ground for a distringas; unless it appear that the defendant has no place of residence.

MAULE, J.—There is nothing in the affidavit to shew that the clerk tried to serve the writ at the defendant's dwelling-house.

TINDAL, C. J.—If the deponent had gone on to say, that the defendant had no dwelling-house, it might have been sufficient.

Rule refused.

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Service of a rule nisi to compute upon a clerk of the defendant's, at his counting-house, is not sufficient.

WARWICK v. BACON.

GASELEE, Serjt., moved to make absolute a rule to compute principal and interest upon a bill of exchange. The affidavit stated the service of the rule nisi to have been made upon a clerk at the counting-house of the defendant. He contended, that this circumstance distinguished the case from *Rowland v. Vizetelly (a)*, where the service was "upon a clerk or servant." He submitted, that as the action was brought on a bill of exchange, a clerk in a counting-house was a very fit person to whom papers relating to such matters should be delivered. [*Maule, J.*—This is not the case of a clerk receiving a bill of exchange on behalf of his master, but of a rule nisi to compute. The common course is, where rules do not require personal service, to serve them at the dwelling-house of the defendant.]

TINDAL, C. J.—You had better amend the service.

Rule refused.

(a) *Ante*, vol. 1, p. 767. See S. C. 7 Scott, N. R., 429.

HODDING v. STUCHFIELD.

A writ of summons was served on the defendant, with an indorsement, stating that on payment of a certain sum for debt and costs, within four days, proceedings would be stayed. After the four days had expired, the defendant's wife paid the amount to the clerk of the plaintiff's attorney, in the absence of his master, and obtained from him a receipt, which the attorney, upon his return, disavowed; and he proceeded with the action, but did not return the money. The Court, under these circumstances, refused a rule to rescind a Judge's order, which had been granted, for a stay of the proceedings in the action.

MURPHY, Serjt., moved for a rule, calling on the defendant to shew cause why an order made by *Cresswell, J.*, at Chambers, for a stay of proceedings, should not be rescinded. The action was in assumpsit, and the indorsement on the writ of summons, which was served on the

After the four days had expired, the defendant's wife paid the amount to the clerk of the plaintiff's attorney, in the absence of his master, and obtained from him a receipt, which the attorney, upon his return, disavowed; and he proceeded with the action, but did not return the money. The Court, under these circumstances, refused a rule to rescind a Judge's order, which had been granted, for a stay of the proceedings in the action.

7th of June, stated that the plaintiff claimed 26*l.* 6*s.* 6*d.*, for debt, and 2*l.* 2*s.* for costs, and that upon payment of the amount thereof, within four days from the service of the writ, further proceedings would be stayed. On the 13th of June, the defendant's wife went to the office of the plaintiff's attorney, and finding him absent, paid the amount to his clerk, who gave her a receipt for it. Upon his return to the office, the attorney, having been informed of what had taken place in his absence, immediately wrote a letter to the defendant, stating that the clerk had no authority to give a receipt for the money, and that unless 2*l.*, additional costs, which had been incurred since the expiration of the four days mentioned in the indorsement, were paid by the following day, the plaintiff would proceed with the action. The attorney did not, however, send back the money which the plaintiff's wife had paid, and the defendant refused to pay the additional sum demanded; whereupon the attorney went on with the action, but the defendant obtained an order for the stay of proceedings. It is submitted, that as the money was not paid by the defendant's wife, until after the four days had expired, the attorney was justified in proceeding with the action, the receipt having been given by mistake. In *Bowdidge v. Slaney* (a), it was held, that a Judge's order for the stay of proceedings was too late, when made after the four days allowed the defendant by the rules Hil. T., 2 Wm. 4, r. II., and Mich. T., 3 Wm. 4, r. 5. [*Tindal*, C. J.—In that case, no money had been paid to the plaintiff or his attorney. Why did not the attorney return the money he had received?] The defendant did not demand it.

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TINDAL, C. J.—The defendant ought not to be put, by the clerk's mistake, in a worse situation than before he paid the money.

Rule refused.

(a) 2 Bing. N. C. 142; See S. C. 2 Scott, 197; 4 Dowl. 140.

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HINTON, Appellant, and The Town Clerk of WENLOCK,
Respondent.

The Court has no power to remit to the revising barrister the case drawn up by him, in order that a fact, deemed material by one of the parties to the appeal, but omitted by the barrister on the ground of immateriality, may be inserted; the finding of the barrister being conclusive upon the question of what the material facts are.

KEATING moved, on the part of the appellant, for a rule calling upon the respondent to shew cause why the statement of facts, drawn up and signed by the revising barrister, should not be remitted to him, in order to have a certain fact inserted therein. The affidavit in support of the application stated, that the fact had been proved before the revising barrister, and that the appellant believed it to be material; but that the revising barrister had declined to insert it, on the ground that it was, in his judgment, immaterial. *Keating* submitted, that under the stat. 6 Vict. c. 18, s. 65, the Court might send back the statement to the barrister to be more fully stated.

PER CURIAM.—Looking at the 42nd and the 65th sections of the statute, it is clear that we have no power to comply with this application. We can only remit the case to the revising barrister, under the terms of the 65th section, when the statement of the matter of the appeal is not sufficient to enable us to give judgment in law, (which is not the case here;) and the 42nd section expressly provides, that the barrister is to state the facts, which in his judgment shall be material.

Rule refused.

NETTLETON, Appellant, and BURRELL, Respondent.

The Court refused to allow an appeal against the decision of a revising barrister to be entered, where

the barrister, after consenting to grant a case, and expressing his approval of the points raised in a statement of facts, returned the statement to the parties to draw up in another form; and died without signing the case so drawn up.

KINGLAKE, Serjt., moved for leave to enter this appeal from the decision of the revising barrister for the borough of Wakefield. It appeared, by the affidavit upon which the motion was founded, that the appellant had

objected, at the revision, to the votes of the respondent, and others; and that the barrister had disallowed the objections, and retained the names of the parties upon the list. The appellant, thereupon, gave the barrister, in open Court, a written notice of his intention to appeal against the decision; and the barrister consented to grant a case for the opinion of this Court, and desired the parties on both sides to prepare a statement of facts, promising that he would afterwards examine and settle such statement. The appellant and respondent accordingly drew up, on the same day, a statement of facts, which they both signed, and handed to the revising barrister, who expressed his approval of the facts stated and the points of law raised; but returned it to the parties, with a recommendation to draw it up in accordance with a form, which he lent to them for that purpose. The parties, accordingly, drew the case in the form suggested, and sent it back to the barrister, with the declaration required by the statute, duly subscribed by the appellant and the respondent. Shortly afterwards, the revising barrister died, and the case was found, after his death, among his papers, unsigned by him.

The learned serjeant submitted, that the signature of the barrister was not necessary, under the 42nd section of the stat. 6 Vict. c. 18, to give the Court jurisdiction. His approbation of the case was all that was required, and that had been given. [*Tindal*, C. J.—The affidavit does not state that the revising barrister expressed his approbation of the case as altered. Non constat that he might not have made some alterations in it himself. *Maule*, J.—The presumption which arises from the absence of his signature is, either that the revising barrister did not see the paper, or that, having seen it, he did not approve of it. *Tindal*, C. J.—It seems to me, that the matter was merely in fieri.]

PER CURIAM.

Motion refused.

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EDGEELL v. CURLING.

A writ of subpoena, bearing teste out of Term, is void.

THIS was an action on the case against the defendant, for disobedience to a writ of subpoena duces tecum, in having neglected to appear as a witness on the behalf of the plaintiff, and to produce the books and papers mentioned in the writ.

The defendant, in his eighth plea, set out the writ, which was in the ordinary form, but the teste ran thus; "Witness, Sir Nicolas Conyngham Tindal, Knight, at Westminster, the 6th day of December, in the seventh year of our reign." The plea then went on to allege, that "the said 6th day of December, in the 7th year of her Majesty's reign, on which day the said writ was tested, was in the Vacation after Michaelmas Term, 1843, and not in Term time; wherefore the writ of subpoena duces tecum was wholly void in law."

General demurrer to this plea, and joinder in demurrer.

Channell, Serjt., to support the demurrer. Of late, a practice has arisen of testing writs of subpoena in Vacation; and there seems to be no sufficient reason why this should not continue to be done. No doubt writs were formerly tested in Term time, but certain statutable exceptions to this rule have been introduced. By the statute 2 Wm. 4, c. 39, s. 12, all writs issued under the authority of that act must bear date the day on which they are issued; but that act certainly does not in terms provide, that a writ of subpoena shall bear such date. Then comes the statute 3 & 4 Wm. 4, c. 67, s. 2, which recites "whereas by the existing law, and the practice of the Courts of Common law, actions may be brought, and issues proceed to trial and final judgment in Vacation, notwithstanding the cause of action may have arisen subsequent to the then preceding Term, and jury process of writs of execution, are now by law tested in Term time only;" and then proceeds to enact, "that

the writ of *venire facias juratores* may be tested on the day on which the same shall be issued, and be made returnable forthwith," &c. ; "and that all writs of execution may be tested on the day on which the same shall be issued." It is submitted, therefore, that the writ of subpoena is within the equity of this act of Parliament. As the writ, which is the commencement of the action, may be tested after Term, and the writ which closes the proceedings, the writ of execution, may be tested the day on which it is issued, there is no valid reason why a writ of subpoena may not also be tested in Vacation. Supposing, however, that the statute does not apply in the present case, the question is, whether a writ of subpoena tested in Vacation is void, or merely voidable. It is submitted, that at the most it is only irregular. *Shirley v. Wright* (a), will probably be relied upon for the defendant; but in that case the writ was a writ of execution. [*Tindal*, C. J.—Suppose the writ to be voidable only, at whose election is it to be avoided? If at the election of the witness, he has already made his election that it should be void.] In *Hart v. Weston* (b), the plaintiff declared, that after the first day of Trinity Term, 1706, viz., on the 23rd day of February, 1769, the plaintiff prosecuted out of the Court of our Lord the King, before the King himself, a writ of *latitat*, directed to the sheriff of Cornwall; which, it was argued, was impossible, as the Court could not sit out of Term. In that case, Lord *Mansfield* undoubtedly said, that the writ would be void, if it bore teste upon a day out of Term. [*Tindal*, C. J.—A subpoena is as much a judicial process as a *latitat*, and must be issued while the Court is sitting.]

Shee, Serjt., who was on the other side, was not called upon.

PER CURIAM.

Judgment for the Defendant.

(a) 2 Salk. 700; See S. C.
2 Ld. Raym. 775.

(b) 5 Burr. 2586; See S. C.
2 W. Bl. 683.

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**BUSH and Another v. SAYER, and In re BUSH and
MULLENS, Gents. two, &c.**

A Court of common law has no authority under stat. 6 & 7 Vict. c. 73, s. 37, to order a bill to be referred to the Master for taxation, where none of the charges are for business done in a Court of law; although an action at law has been brought to recover the amount of the bill.

ASSUMPSIT by the plaintiffs to recover the amount of four bills of costs. None of the charges were for business done in a Court of equity or common law. It appeared, that on the 11th of October, 1842, the defendant wrote to Mr. Bush, requesting that his accounts and bills of costs might be sent to Mr. Dennett, a solicitor residing at Worthing, who afterwards desired Mr. Bush, by letter, to transmit them, for him to his London agents, Messrs. Hodgson and Co. On the 24th of May, 1843, the bills of costs, unsigned by the plaintiffs, were sent to Messrs. Hodgson and Co.; but they were accompanied by a letter, signed by the plaintiffs, and referring to the bills. On the 29th of June, 1844, the present action was commenced; and in the July following, the defendant obtained an order from *Coltman, J.*, at Chambers, to refer the bills to the Master to be taxed, the learned Judge being of opinion that although there had been a good delivery of the bills, more than twelve months previously, special circumstances had been shewn, under which he had authority to order the reference to the Master. The plaintiffs thereupon applied for and obtained the insertion in the order of a condition, authorizing them to enter up final judgment, in case the sums found due, upon taxation, were not paid by the defendant.

Sir *T. Wilde*, Serjt., having obtained a rule nisi on the part of the plaintiffs to rescind the order of *Coltman, J.*,

Talfourd, Serjt. (*H. J. Hodgson* with him), showed cause. The plaintiffs are not in a situation to oppose the taxation of the bills. The condition that they should enter up final judgment if the sum found to be due on taxation were not paid, was inserted in the order upon the application of the

plaintiffs themselves; and they must be taken, therefore, to have been consenting parties to the order of reference. In the next place, it is submitted, that the bills are subject to taxation, by reason of the action having been brought in this Court, of which the plaintiffs are officers. Before the statute 6 & 7 Vict. c. 73, passed, these bills would not have been taxable at all; but now, all costs and charges of attorneys and solicitors are rendered taxable, although the bills were delivered before the statute came into operation, *Binns v. Hey* (a). The statute 6 & 7 Vict. c. 73, does not take away the authority which the Court had previously, and the power given by the 37th section to the Lord Chancellor, or the Master of the Rolls, is merely cumulative. It will be contended, on the other side, that the bills cannot be taxed, because they were delivered more than twelve months before the application to tax was made; but then comes the question, whether there are not special circumstances which justify the order of reference to the Master? [*Maule, J.*—The 37th section puts the business done upon the footing of business done in the Court of Chancery. The application ought to be made to the Lord Chancellor, or the Master of the Rolls, who are the proper persons to determine what special circumstances will authorize a reference to taxation, where more than twelve months have elapsed since the delivery of the bills.] The effect of that construction of the statute would be, that although the action on the bills was brought in one Court, the bills themselves could only be taxed in another. [*Tindal, C. J.*—The words of the 37th section of the statute are very clear, that “in case no part of such business shall have been transacted in any Court of law or equity,” it shall be lawful “for the Lord Chancellor or the Master of the Rolls” to refer the bill to be taxed. It seems clear also that the original delivery of the bills was good, because the section provides that the bill shall either be signed by the

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(a) *Ante*, vol. 1, p. 661.

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solicitor, "or be inclosed in or accompanied by a letter subscribed in like manner referring to such bill."]

Sir *T. Wilde*, Serjt., who was on the other side, was not called upon.

PER CURIAM.

Rule absolute.

 PETRIE v. CULLEN.

The plaintiff having given, on the 8th of May, a peremptory undertaking to try at the sittings after Trinity Term, entered the cause for trial on the evening of the 11th of June, the last day allowed for so doing. The cause was consequently made a remanet. The plaintiff did not apply in the following Term to enlarge his peremptory undertaking, and the defendant obtained judgment as in case of a nonsuit. The Court discharged a rule nisi for setting aside the judgment.

A RULE nisi had been obtained on the fifth day of the present Term, for setting aside a rule absolute for judgment as in case of a nonsuit. The action was brought in debt, and the plaintiff declared on the 9th of January, 1843. The defendant pleaded *nunquam indebitatus* on the 3rd of February following. The plaintiff taking no steps, the defendant, in November, 1843, ruled him to reply. After issue had been joined, the plaintiff neglected to try the cause; and the defendant, accordingly, in the beginning of Easter Term, 1844, obtained a rule nisi for judgment as in case of a nonsuit. That rule was discharged on the 8th of May, the last day of Easter Term, upon a peremptory undertaking by the plaintiff to try the cause at the Sittings after Trinity Term. The 11th of June was the last day for entering causes for the Sittings, and it appeared from the affidavits on the part of the defendant, that the plaintiff did not enter his cause till just before the closing of the office, in the evening of that day. At the Sittings, the cause was made a remanet; but it appeared that if it had been entered in the morning of the 11th of June, it would have been tried. On the 2nd of November, the defendant obtained a rule absolute for judgment as in case of a nonsuit, which rule was served on the plaintiff on the 5th of November. The plaintiff had not applied to enlarge his peremptory undertaking within the first four days of the

Term; but on the 6th of November he obtained the present rule to set aside the judgment of nonsuit, upon the ground of irregularity.

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Byles, Serjt., shewed cause. Even if there had been no default on the part of the plaintiff in proceeding to try, the judgment ought to stand, as there has been an absolute undertaking by him to try at the Sittings after Trinity Term. In *Ward v. Turner* (a), the plaintiff had given a peremptory undertaking to try at a particular assize, which he was prevented from fulfilling by the sudden illness of the Judge. It was held that this was not a sufficient excuse, and that the defendant was entitled to judgment as in case of a nonsuit absolute. So in *Sell v. Adams* (b), where the plaintiff had given, on the 30th of January, a peremptory undertaking to try before the sheriff, at the next practicable Court-day, and the sheriff had been in the habit of appointing Court days, on the application of the parties; *Coleridge*, J., held that the defendant was entitled to retain his judgment, as in case of a nonsuit, which he had obtained in Easter Term; upon the ground that the plaintiff might have applied to the sheriff, and got the cause tried earlier: observing, "the plaintiff was bound to know the practice of the sheriff's Court, when he undertook to comply with it." The proper course for the plaintiff in this case to have pursued, would have been to have applied for an enlargement of his peremptory undertaking; since, if the cause had been tried after the peremptory undertaking had expired, the verdict might have been set aside as irregular; *Negrete v. Martorel* (c). It is quite clear, however, looking at the dates, that it was entirely the plaintiff's fault that the cause was not tried; and it is equally evident that he never meant that it should be tried.

(a) 5 Dowl. 22.

(b) 7 Dowl. 672.

(c) *Ante*, vol. 1, p. 735. See S. C. 7 Scott, N. R. 483.

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Channell, Serjt., to support the rule. The question is, whether the plaintiff has performed the condition into which he entered, of "proceeding to trial" at the sittings after Trinity Term; and it is submitted that he has fulfilled it. His briefs were prepared, and his witnesses were ready; and, although the pressure of business prevented the cause from being tried, he has satisfied the undertaking, so far as he was enabled to do.

TINDAL, C. J.—The statute 14 Geo. 2, c. 17, begins by stating, that where any issue is joined in any action, and the plaintiff in such action shall neglect to bring such issue on to be tried according to the course and practice of the Court, then it shall be lawful for the Judges of the Court, at any time after such neglect, upon motion, to give the like judgment for the defendant in such action, as in cases of nonsuit; unless the said Judges shall, upon just cause and reasonable terms, allow any further time for the trial of such issue; that is, in effect, unless what is now called a peremptory undertaking to try the cause in a certain time, be given on the part of the plaintiff. The statute then goes on to say, "And if the plaintiff shall neglect to try such issue within the time so allowed him, then and in every such case the said Judges shall proceed to give such judgment as aforesaid." If this were a new question, I should be disposed to hold, that the word "neglect" in the concluding part of the section, ought to have the same construction as in the earlier part of it; that is, a neglect to bring the issue on for trial, according to the course and practice of the Court. I should, therefore, have been very slow to say, that if, in consequence of the illness of the Judge, or the unexpected pressure of business, a cause which a plaintiff was under a peremptory undertaking to try, was made a remanet, the plaintiff had neglected to try it. But it does not appear necessary to discuss that question; because here there are circumstances to shew that the plaintiff has in fact neglected to try his cause according to

the course and practice of the Court. He has neglected to use due diligence in entering the cause for trial. It appears from the affidavits, that the cause could not be tried in consequence of its having been entered so late that it stood at the bottom of the cause list; and the affidavits go on to state, that if the plaintiff had entered it on the morning of the 11th of June, it would have been tried. Looking at the repeated delays interposed by the plaintiff, and to the fact that the defendant was constantly obliged to urge the plaintiff on to take the next step, I think we are justified in saying that the plaintiff has neglected to try his cause according to the course and practice of the Court.

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COLTMAN, J.—I do not feel disposed, myself, to depart from the rule laid down by my brother *Coleridge*, in *Ward v. Turner (a)*. He there says, “Was there any default on the part of the plaintiff?” “In one sense there was none, as there was no moral fault, and no neglect on his part; but, in the sense of a condition, it was a peremptory undertaking to be responsible, though he had no control over the circumstances which prevented the trial. The plaintiff should have applied to enlarge his peremptory undertaking, and if that had been done, no doubt the Court would have looked into all the facts of the case.”

MAULE, J.—I also think that the rule should be discharged. In Easter Term, the Court gave the plaintiff a longer time to try the cause than he would have been entitled to according to the ordinary course of practice, upon the terms of his undertaking peremptorily to proceed to trial, not at the then next sittings, but at the sittings after Trinity Term. I have always understood that a “peremptory undertaking” means that a party undertakes absolutely that the trial shall take place. That such is the case appears

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to me to be established by two circumstances: first, that the Court always grants a rule absolute in the first instance, for the costs of the day, for not proceeding to trial pursuant to a peremptory undertaking; whereas, if it were an undertaking to use due diligence to try, each case would depend on its own circumstances, and the rule would be a rule nisi only. The other reason is this: it constantly happens, when a rule for judgment as in case of a nonsuit is discharged on a peremptory undertaking, the plaintiff says, "I cannot give a peremptory undertaking to try at the next sittings, but I will to try at the next after." That assumes that something which might happen without his default, would yet be a breach of the condition of the undertaking. It is, therefore, an absolute undertaking on his part, like a warranty that a ship shall sail on a certain day; and it would be no answer to a breach of such a contract, that the party had used his endeavours that the ship should sail on that day. If a contract be to do a certain thing, it would considerably obstruct the business of mankind to interpret that contract in any other than its ordinary sense, and to inquire in every case, how or why the party was prevented from fulfilling his engagement. I will only add, that in the present case the plaintiff seems to me to have used considerable skill, and all the diligence in his power, to prevent the cause from being tried, consistently with a colourable ground for saying that he did proceed, not *to*, but *towards*, a trial.

ERLE, J., concurred.

Rule discharged, with costs.

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HERRING v. WATTS.

BYLES, Serjt., moved for a rule to shew cause why a rule which had been obtained to change the venue in this action should not be rescinded. The action was in debt for the use and occupation of premises in Norwich, and the venue was originally laid in London; but a rule had been obtained by the defendant to change it to Norwich, upon the usual affidavit that the plaintiff's cause of action arose there. The venue cannot be changed in an action of debt for rent; *Duplessis v. Chalk* (a). The present action for use and occupation stands upon the same footing.

The defendant may change the venue, on the usual affidavit, in an action of debt for use and occupation.

TINDAL, C. J.—The rule is, that the venue shall not be changed in an action brought upon a specialty; and debt for rent is in the nature of a specialty. In *Duplessis v. Chalk*, there was a formal demise; but here the action is in debt for use and occupation.

MAULE, J.—The action is brought upon a contract for use and occupation, which supposes an actual occupation of the premises within the county where they are situate; and, therefore, the defendant may reasonably say, that the cause of action arose in that county. But a specialty has no locality, being a written contract, like a promissory note or bill of exchange, to which the idea of locality does not attach.

Rule refused.

(a) 2 Stra. 878; S. C. Barnard. 379; Fitz. 166.

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HALL v. IVES.

After verdict for the plaintiff, and a rule absolute for a new trial obtained, the Court granted a rule to admit the plaintiff to sue in formâ pauperis.

HALCOMBE, Serjt., moved for a rule to admit the plaintiff to sue in formâ pauperis. The present application is made pendente lite. Formerly it was doubted whether this circumstance afforded any objection to such a motion; but it is apprehended, that it is now fully settled by late cases that it does not; *Brunt v. Wardle* (a), and *Doe dem. Ellis v. Owens* (b). [Tindal, C. J.—In what stage of proceeding is the cause?] A rule absolute has been obtained for a new trial, after a verdict for the plaintiff.

PER CURIAM.

Rule granted.

(a) 3 M. & G. 534; See S. C. 1 Dowl. 229, N. S.; 4 Scott N. R. 188.
(b) 9 M. & W. 455; See S. C. 1 Dowl. 404, N. S.

GRINNELL v. WELLS.

In an action on the case for the seduction of a daughter, the declaration must allege a consequent loss of service.

The plaintiff declared in case for the seduction of his daughter, that being a poor person, and unable to maintain herself except by her work, the defendant

debauched her, and she thereby became sick and unable to work; whereby the plaintiff was forced and obliged, and did necessarily pay sums of money for her maintenance, and in and about her delivery, and curing her of her illness: *Held*, on motion in arrest of judgment, after verdict for the plaintiff, that the declaration disclosed no sufficient cause of action.

CASE. For that whereas, before and at the time of the committing the grievances by the defendant hereinafter mentioned, and from thence until the time of her pregnancy and sickness hereinafter mentioned, and of the plaintiff expending the monies and incurring the debts hereinafter mentioned, Alice Grinnell, the daughter of the plaintiff, was a poor person, who maintained herself by her labour and personal services; and, except by her labour and personal services, was not of sufficient ability to maintain herself; and was, during all that time, unmarried, and an infant under the age of twenty-one years, to wit, of the age of fourteen years; and at and during, and after the

time of her pregnancy and sickness as hereinafter mentioned, and of the plaintiff expending the monies and incurring the debts hereinafter mentioned, the said Alice was such poor person, infant, and unmarried, and was not of sufficient ability to maintain herself: yet the defendant, well knowing the premises, but contriving to injure the plaintiff, and to compel him to maintain the said Alice, heretofore, to wit, &c., debauched and carnally knew the said Alice; whereby the said Alice became pregnant and sick with child, and so continued for a long time, to wit, for the space of nine months then next following; at the expiration whereof, to wit, on, &c., she, the said Alice, was delivered of the child with which she was so pregnant as aforesaid; by means of which premises, the said Alice, for a long time, from the day and year first aforesaid hitherto, became and was unable to work or to maintain herself, which she might and otherwise would have done; and the plaintiff so being her father as aforesaid, and being of sufficient ability to maintain the said Alice, was, by means of the premises, during all that time forced and obliged, and necessarily did, at his own charges, maintain the said Alice; and also by means of the premises, the plaintiff was obliged and did necessarily pay, lay out, and expend divers monies and incur divers debts, in the whole amounting to a large sum, to wit, &c., in and about the maintaining, nursing, taking care of, and curing the said Alice, and in and about the safe delivery of the said Alice, during the time she, the said Alice, was so unable to maintain herself as aforesaid: to the plaintiff's damage, &c.

Plea. Not guilty.

At the trial, which took place at the Gloucester Summer Assizes for 1843, a verdict was found for the plaintiff for 200*l*.

A rule nisi had been obtained by *Talfourd*, Serjt. (a), to arrest the judgment, on the ground that the declaration

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(a) In Michaelmas Term, 1843.

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contained no sufficient cause of action. He cited *Dean v. Peel* (a), *Satterthwaite v. Dewhurst* (b), *Woodward v. Walton* (c), *Bennett v. Allcott* (d), *Russell v. Corne* (e), *Postlethwaite v. Parkes* (f), *Harris v. Butler* (g), *Blaymire v. Haley* (h), *Maunder v. Venn* (i), *Speight v. Oliviera* (k), *Mortimore v. Wright* (l), *Gray v. Jefferies* (m), *Barham v. Dennis* (n), *Robert Mary's case* (o).

Sir *Thomas Wilde*, Serjt., and *Channell*, Serjt., (with whom was *Godson*), shewed cause (p). This is an action against the defendant for seducing the plaintiff's daughter; whereby the plaintiff, his daughter being an infant and unable to maintain herself, was obliged to pay the expenses attendant upon her delivery and illness, and of her maintenance. The defendant has only pleaded the general issue; and since the New Rules, that plea puts in issue simply the fact of the debauching. The other allegations in the declaration are admitted; and after verdict for the plaintiff, must be taken as if proved at the trial. By the 43 Eliz. c. 2, s. 7, the father of any poor person not able to work, may be compelled by an order of justices, to maintain such child, being of sufficient ability. It is true that the other relations of such person are also liable; but there is nothing to shew on the face of the declaration that there was any other individual, in this instance, who could be made to contribute to the expenses of her maintenance, except her father. Therefore, it must be taken upon the facts disclosed in the declaration, that the father could have been compelled, by an order of justices, to maintain his child. If so, it could not

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| (a) 5 East, 45. | (h) 6 M. & W. 55. |
| (b) 5 East, 47, n.; S. C. 4 Dougl. 315. | (i) M. & M. 323. |
| (c) 2 New Rep. 476. | (k) 2 Stark. N. P. C. 493. |
| (d) 2 T. R. 166. | (l) 6 M. & W. 482. |
| (e) 2 Lord Raym. 1031; See S. C. 1 Salk. 119; 6 Mod. 127. | (m) Cro. Eliz. 55. |
| (f) 3 Burr. 1878. | (n) Cro. Eliz. 770. |
| (g) 2 M. & W. 539. | (o) 9 Rep. 113, a. |
| | (p) In Easter Term, 1844. |

be necessary for him to wait till such order was made, before supporting his child; *Blyth v. Smith* (a). But even if this view be incorrect, there is still the allegation that he "was forced and obliged, and necessarily did pay, lay out, and expend," &c., and the question is, what is the legal meaning of those words? If the defendant objects that the means by which the plaintiff was "obliged" should have been set out, that would have been the proper subject of a demurrer. But not having demurred, it must be taken to be proved, equally as if the allegation had been traversed, and found for the plaintiff at the trial. In actions for negligent driving, &c., there is a similar allegation, that the plaintiff "was forced and obliged to expend," &c.; but it has never been thought necessary to set out the means by which the plaintiff was so forced and obliged. Besides, the nature of this action should be considered. Where the loss of service has been stated as the gist of the action, the Courts have always been ready to construe any act of service, however slight, sufficient for the purpose of maintaining the action; and in the case of *Hall v. Hollander* (b), which will be relied on by the other side, the plaintiff only failed because having alleged a loss of service in his declaration, he was unable to prove it, from the tender age of the child, who was incapable of rendering any act of service; and because the expenses incurred were not proved to be necessarily incurred. Mr. Justice *Bayley*, in delivering judgment, there says, "in this case, too, it was proved that the father did not necessarily incur any expense; if he had done so I am not prepared to say that he could not have recovered upon a declaration describing, as the cause of action, the obligation of the father to incur that expense." The case of *Satterthwaite v. Dewhurst* (c), will also be relied on by the other side as being in point. But that case is very loosely reported; and, in fact, is merely a note

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(a) 6 Scott. N. R. 361; See 7 D. & R. 133.
 S. C. 5 M. & G. 405. (c) 5 East, 47, n.; S. C. 4
 (b) 4 B. & C. 660; See S. C. Dougl. 315.

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of the case, found amongst the reporter's papers, and re-printed lately. The point there really intended to be decided, was the distinction between trespass and case, and that the action being in the latter form, was not sufficient, without an allegation "per quod servitium amisit." That that is so, is clear from the learned Judge referring to the case of *Russell v. Corne* (a), as being in point: for in that case, the only point in dispute was the one described. If the loss of service will give a cause of action, it must be in a pecuniary point of view; then, à fortiori, an actual pecuniary loss alleged, will be sufficient. In *Hunt v. Wotton* (b), two of the Judges seem to have been clearly of opinion that an action could be brought by a father for an injury to his son, by which the father was put to expense in curing him, without alleging loss of service. The following cases were also cited; *Rex v. Cornish* (c), *Spierres v. Parker* (d), and *Rippon v. Norton* (e).

Talfourd, Serjt. (with whom was *Greaves*), in support of the rule. The fallacy that runs through the whole argument on the other side is, the assumption that the debauching the plaintiff's daughter is a "wrongful act" in the legal acceptation of the words, on the part of the defendant. It may be quite true, as the plaintiff contends, that after verdict it will be intended that the plaintiff was, in fact, "forced and obliged" to lay out the money about the delivery of his daughter, and her maintenance, equally as if an order of justices had been stated, compelling him to do so; but the objection remains in its original force; that although there may be an injuria resulting to the plaintiff from the defendant's act, there is no damnum to the plaintiff in the act itself; and to maintain an action on the case, there must be both a damnum and an injuria. It may be an improper, an immoral, an irreligious act; but

(a) 2 Lord Raym. 1031.

(d) 1 T. R. 141.

(b) Sir T. Raym. 259.

(e) Cro. Eliz. 849.

(c) 2 B. & Ad. 498.

it is not a *wrongful* act, in the legal meaning of that word; as far as regards either statute or common law. [*Cresswell*, J.—Would the action lie if the debauching the plaintiff's daughter were the only act complained of, and no damage had ensued?] Clearly it would not, both must concur; *Postlethwaite v. Parkes* (a), *Dean v. Peel* (b), *Bennett v. Allcott* (c). In *Speight v. Oliviera* (d), the daughter was in the defendant's service; but there the defendant having taken her with the intent to debauch her, it was held that the service of the father still continued. In *Harris v. Butler* (e), and in *Blaymire v. Haley* (f), which were both cases in which the declarations were demurred to, for not showing a loss of service to the plaintiff, the Court decided that the declarations were insufficient. In *Hunt v. Wotton* (g), the Court evidently proceeded upon a misconception that by the common law of England, a father could be compelled to provide for his child. But that that is not so, is fully proved by the case of *Mortimore v. Wright* (h). It would be difficult to foresee the consequences of holding that such an action as the present could be maintained. Not only the father might bring such an action; but any of the other relatives mentioned in the statute of 43 Eliz., if they thereby became liable to maintain the party. The proper test to be applied to all actions on the case is, can the plaintiff bring his action for the act itself which he charges the defendant to have committed, without including the resulting damage? Apply that test to the present action, and it is clear the action cannot be sustained.

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Cur. adv. vult.

TINDAL, C. J., afterwards, in the present Term, delivered the judgment of the Court.—The question in this case arises upon a motion in arrest of judgment, and is this,

(a) 3 Burr. 1878.

(b) 5 East, 45.

(c) 2 T. R. 166.

(d) 2 Stark. N. P. C. 493.

(e) 2 M. & W. 539.

(f) 6 M. & W. 55.

(g) Sir T. Raym. 259.

(h) 6 M. & W. 482.

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whether a father can maintain an action upon the case for the seduction of his daughter, where he is unable to allege in the declaration, the loss of his daughter's service by reason of the defendant's wrongful act? The declaration in this case contains no allegation of the loss of the service of the daughter, but instead thereof, alleges that the daughter was a poor person, maintaining herself by her labour and personal services, and not of sufficient ability to maintain herself otherwise; and after stating that the defendant debauched her, and that she was delivered of a child, and her thereby becoming unable to work or maintain herself, alleges, as the gravamen of the plaintiff, that he, being her father, and being of sufficient ability to maintain his said daughter, was, by means of the premises, forced and obliged, and necessarily did, at his own charge, maintain his said daughter, and did necessarily pay large sums of money in and about the maintenance and nursing of his said daughter, during the time she was unable to maintain herself. And the question becomes this, whether the want of the allegation of the loss of service, is supplied by the substitution of the before recited allegation.

The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed, from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant; but upon the loss of service of the daughter, in which service the father is supposed to have a legal right or interest. Such is the language of Lord *Holt*, in 2 *Lord Raymond*, 1032, and such the opinion of the Court in the earlier case of *Gray v. Jefferies* (a), with reference to an action by a father for personal injury to a child, which stands precisely on the same footing. It has, therefore, always been held, that the loss of service must be alleged in the declaration, and the loss of service must be proved at the trial, or the plaintiff must fail. (See *Bennett*

(a) Cro. Eliz. 55; See also 2 Lutw. Rep. 1496.

v. *Allcott* (a)). It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant; and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter. The distinction is most clearly and pointedly put by the Court in *Robert Mary's case* (b), where it is said, "if my servant be beaten, the master shall not have an action for this beating, unless the battery is so great, that by reason thereof he loses the service of his servant; but the servant himself for every small battery, shall have an action, and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a per quod, viz., per quod servitium amisit; so that the original act is not the cause of his action, but the consequent upon it, viz., the loss of the service is the cause of his action."

No precedent in an action for seduction has been brought before us, (except those in *Harris v. Butler* (c), and *Blaymire v. Haley* (d), in both which cases the declarations were held bad,) in which there has not been an allegation of the loss of service to the father; and the struggle has always been at the trial, to give some proof either of actual service, or of the implied relation of master and servant. And in the case of *Dean v. Peel* (e), where the loss of service was alleged in the declaration, but where the proof at the trial was only this, that the daughter was in the service of another person at the time of the seduction, without any intention of returning to her father's house, but that upon her seduction, she came home, and was maintained by her father during her illness, the action was, notwithstanding, held not to be maintainable. Now this case is in evidence, precisely what the present case is in pleading upon the record; and, therefore, affords a direct

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(a) 2 T. R. 166.

(b) 9 Rep. 113, a.

(c) 2 M. & W. 539.

(d) 6 M. & W. 55.

(e) 5 East, 45.

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authority for the position, that where there is the absence of any allegation of the loss of service to the father, although there may be an allegation of his being compelled to pay the expenses arising from the wrongful act, the action is, nevertheless, not maintainable.

Upon the ground of action, therefore, set forth upon this record, we do not feel ourselves warranted in giving judgment for the plaintiff, as we think the declaration discloses no legal wrong to the plaintiff,—no invasion or violation of his legal rights.

Indeed, many observations suggest themselves against the soundness of the argument upon which the plaintiff relies.

In the first place, if the liability to support the daughter under the statute of Elizabeth, would form a ground of action *per se*, independent of any service, it would seem scarcely credible, as the statute of Elizabeth was passed long before any of the cases above referred to, that the difficulty of proof of service, either actual or implied, which has occurred in so many cases, should not have been avoided and answered, by framing the declaration like the present, upon the legal liability of the father to maintain his daughter under the statute.

In the next place, if this ground of action be available in the case of seduction of a daughter, it is equally so in the case of every beating of a son, whether his service be lost or not; and upon this supposition, the beating of a son at whatever advanced age, and although altogether emancipated from his father's family, would form a ground of action at the suit of the father, if called upon under the statute to maintain his son.

And still further, this anomaly would follow; that as the father is liable under the statute to maintain his daughter, only where he is of sufficient ability so to do, and as the damages recoverable by the father when he brings the action, are confessedly not limited to the actual expenditure of his money, but he may recover damages according to the

aggravation of the particular case, the right of action to recover a compensation would be confined to persons of ability to maintain their daughters, and would be denied to the poorer orders of the community,—a result that would be most unreasonable.

We, therefore, think, for the reasons above given, that the cause of action, as stated on this record, is insufficient, and that the rule for arresting the judgment must be made absolute.

Rule absolute.

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COVINGTON v. HOGARTH.

A RULE had been obtained by *Channell*, Serjt., for a stay of proceedings in this action. It appeared from the affidavits, that the plaintiff, on the 30th of August last, made an affidavit of debt against the defendant to the amount of 60*l.* 17*s.* 6*d.*, and on the 31st of August filed that affidavit in the Court of Bankruptcy, pursuant to the provisions of the statute 5 & 6 Vict. c. 122, s. 11. On the 2nd of September, he delivered to the defendant an account in writing of the particulars of his demand, with a notice requiring immediate payment thereof, in the form prescribed by the act; and at the same time he served him with a copy of the writ of summons in this action, in respect of the same debt, claiming 60*l.* 17*s.* 6*d.* debt, and 2*l.* 2*s.* costs. On the 7th of September, the defendant was served with a summons from the Court of Bankruptcy, requiring him to admit the debt, or to depose to his belief that he had a good defence to the demand. The defendant afterwards paid the debt; but not having paid the 2*l.* 2*s.* costs, the plaintiff proceeded with the action.

A party may take proceedings under the 5 & 6 Vict. c. 122, s. 11; and at the same time proceed by action at common law for the recovery of the same debt.

The plaintiff had made and filed an affidavit of debt against the defendant; and afterwards served the defendant with a notice, under the statute, requiring immediate payment; and also at the same time, with a writ of summons in an action, indorsed for the same debt, with 2*l.* 2*s.* costs. The defendant afterwards paid the debt, in the action.

Talfourd, Serjt., now shewed cause. The question but declined to pay the 2*l.* 2*s.* for costs. The Court refused to stay proceedings

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before the Court is new, viz.: whether a debtor, sued at common law for a debt, and at the same time proceeded against in respect of the same debt, under the provisions of the statute 5 & 6 Vict. c. 122, is entitled, after having paid the amount, to have the proceedings in the action stayed without costs. It is submitted that there is nothing in the late act which gives the defendant a right to this indulgence; and the statute 6 Geo. 4, c. 16, s. 59, applies to a different state of facts. The plaintiff could not foresee that the defendant would pay the debt; and unless he had done so, the action must have gone on. It is quite clear, from the terms of the 19th section of the statute of Victoria, that the act contemplates the double proceeding by action and affidavit of debt: and no hardship is occasioned to the trader against whom the affidavit is filed; because, if improperly summoned, the Court of Bankruptcy may award him costs in their discretion, under section 18.

Channell, Serjt., in support of the rule. The statute 6 Geo. 4, c. 16, s. 59, does not apply in terms; but the question is, whether the present case is not within the equity of that statute, the plaintiff having obtained the payment of his demand by the stringent process of the bankrupt law. That section provides that the proof of a debt under a commission of bankruptcy, shall be deemed an election by the creditor not to proceed against the bankrupt by action; and the statute 6 Geo. 4, c. 16, is repealed only so far as it is inconsistent with the provisions of 5 & 6 Vict. c. 122.

TINDAL, C. J.—I cannot but consider that the statute 5 & 6 Vict. c. 122, contemplated the co-existence of an action with the proceedings taken under that statute; because the 13th section requires, as one of the modes of avoiding an act of bankruptcy, security to be given for the payment of the debt and costs in any action brought or to be brought. The plaintiff, therefore, has a double

remedy; and if the debtor, in order to escape from the consequences of the commission of an act of bankruptcy, comes and pays the debt, after an action has been brought against him to recover it, the action is still in existence; and the proceedings can only be stayed, as in the ordinary case of payment after action brought, upon payment of the costs of the action.

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COLTMAN, J., concurred.

MAULE, J.—We are asked to apply the equity of the statute 6 Geo. 4, c. 16, s. 59; but the proceedings under that section seem to me to bear a very slight analogy to those taken under the statute 5 & 6 Vict. c. 122. I think there are very good reasons why the Legislature should not have intended to deprive a plaintiff of his remedy by action, while conferring upon him the powers given by the act. By payment of a debt which he owes, a trader may protect himself from the consequences of proceedings in a Court of Bankruptcy, under which he might otherwise be made a bankrupt; or he may deny the justice of the demand, give security for the payment of debt and costs, and defend the action which has been brought against him. If he succeed, he obtains his costs; if he fail, he must pay them: and I see nothing in the statute to deprive the plaintiff of his costs, when the defendant admits, by payment of the debt, that the action was not brought without good grounds.

ERLE, J.—It appears to me that the statute was intended to prevent traders defending actions when the debt is really due. The defendant here is in the ordinary position of a trader owing a sum of money, which he pays after action brought; and I see nothing, for my part, in the act of Parliament lately passed, which disables a creditor from recovering his costs of suit in such a case.

Rule discharged.

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The plaintiff having obtained judgment upon demurrer to a replication, the cause went down for trial upon issues of fact, without a venire tam quam. The plaintiff recovered only 20s. damages, and the Judge refused to certify under 3 & 4 Vict. c. 24: *Held*, that the plaintiff was only entitled to the costs of the demurrer.

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BYLES, Serjt., had obtained a rule, calling on the defendant to shew cause why the Master should not review his taxation in this case, and why he should not tax the plaintiff his full costs. The action was in trespass for breaking and entering a messuage of the plaintiff, situate at Audley, in the county of Stafford. The defendant pleaded four pleas, to the second of which the plaintiff replied specially, and joined issue on the others. The defendant demurred to the replication to the second plea, and in Easter Term, 1843, the plaintiff obtained judgment on the demurrer. The cause afterwards went down for trial, and at the last summer assizes for Stafford, a verdict passed for the plaintiff, with twenty shillings damages; but the learned Judge who presided, declined to certify for costs under Lord Denman's Act, 3 & 4 Vict. c. 24. The postea contained no reference to the demurrer, the jury being summoned to try the issues only; and not, "as well to try the issues as to assess the damages." Upon taxation, the Master refused to allow any costs of the trial, or of the demurrer.

Sir *T. Wilde*, Serjt., now shewed cause. The plaintiff, it must be admitted, is entitled to the costs of the demurrer, and to that extent the rule must be made absolute; but the Master has done quite right in refusing to tax the plaintiff his costs of assessing damages upon the demurrer, and also the costs of the issues in fact. The cause went down to trial without any reference to the demurrer; and as no assessment of damages took place, the plaintiff can have no claim to the costs of any assessment. That distinguishes the present case from *Taylor v. Rolfe* (a), which was cited

(a) Since reported, 1 Dav. & Mer. 229.

when the rule was moved. A writ of inquiry had been executed in that case, after judgment for the plaintiff on demurrer, before a Judge of assize; and the plaintiff having recovered one farthing damages, the Master taxed the plaintiff his costs of suit. The Court of Queen's Bench held, that the Master had done right; as the statute 3 & 4 Vict. c. 24, s. 2, did not apply to writs of inquiries consequent upon judgments on demurrers. No such inquiry has taken place here; and, therefore, the case stands as if there had been only issues in fact to be tried. Then, the plaintiff having recovered only twenty shillings damages, is disentitled to costs under the statute 3 & 4 Vict. c. 24, s. 2.

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Byles, Serjt., to support the rule. *Taylor v. Rolfe* shews, that if there had been a venire tam quam, the plaintiff would have been entitled to costs; and the question is, whether he ought to be placed in a worse situation than that in which he would have been, if he had incumbered the record with the long pleadings relating to the demurrer. [*Maule*, J.—He would be entitled to the costs of the inquiry if it had taken place, but it has not.]

PER CURIAM.

Rule absolute as to the costs of the demurrer. Rule discharged as to the other costs.



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RASTRICK v. BECKWITH and Others.

The rule that an attorney, sued jointly with an unprivileged person, shall lose his privilege of being sued in his own Court, is not altered by the Uniformity of Process Act.

In an action against three defendants, D. pleaded that he and the other defendants were attorneys of the Court of Q. B. ; and the plaintiff replied that K., one of the defendants, was an attorney of C. P. ; to which D. rejoined that K. was also an attorney of Q. B. : *Held*, that K. was in the situation of an unprivileged person, and that, consequently, D. was not entitled to remove the cause.

ASSUMPSIT against the defendants, Beckwith, Dye, and Kitton, for work and labour, money paid, and on an account stated.

Plea by the defendant Dye. That before and at the commencement of the suit, each of the three defendants was, and from thence hitherto hath been, and still is, one of the attorneys of the Court of our lady the Queen, before the Queen herself; and hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the said Court of our lady the Queen, before the Queen herself, for divers liege subjects of our lady the Queen, as their attorney; and that the said defendants, and all other the attorneys of the said last-mentioned Court, prosecuting and defending suits and pleas for their clients in that Court, ought, by an ancient and laudable custom, &c., to be free and exempt from being compelled against their will, &c., to answer any plea or plaint in any action personal, (pleas of freehold, felony, and appeals only excepted,) before any justice or minister of our lady the Queen, or other Judge whomsoever, in any Court whatsoever, except before the Justices of our lady the Queen, before the Queen herself. Verification, and prayer of judgment, if the said Court of our lady the Queen of the Bench, will or ought to take cognizance of the said plea.

Replication. That the Court of our lady the Queen, before her Majesty's Justices of the Bench, ought to take cognizance of the plea, because the defendant Kitton, before and at the time, &c., was, and still is, one of the attorneys of the same Court, &c. Verification, and prayer of judgment, and that the defendant, Dye, may be compelled to answer.

Rejoinder. That the defendant, Kitton, was, and still is, one of the attorneys of the Court of our lady the Queen, before the Queen herself, &c. Verification.

Special demurrer to the rejoinder, assigning as causes of demurrer, that the rejoinder did not deny the fact stated in the replication, of Kitton being an attorney of this Court, nor confess and avoid the same; that the rejoinder admitted Kitton to be an attorney of this Court; that, being an attorney of this Court, although an attorney of the Court of Queen's Bench likewise, Kitton was not privileged to be sued in the said last-mentioned Court only; and, therefore, the defendant, Dye, being sued jointly with a person not privileged to be sued in such last-mentioned Court, could not avail himself of any privilege not claimed by his co-defendants; and, also, that it did not appear by the rejoinder, that either Kitton or Beckwith was entitled to, or claimed the privilege of being sued in respect of the causes of action in the Court of Queen's Bench.

Joinder in demurrer.

Talfourd, Serjt., in support of the demurrer. The question is, whether an attorney has a right to the privilege of being sued in the Court of which alone he is an attorney, when sued jointly with another attorney who may be sued in the Court in which the action is brought; or, in other words, whether, in a joint action against a privileged and unprivileged person, the plaintiff is obliged to sue them in the Court in which the privileged person claims to be sued. It is submitted, that in such a case the plaintiff has an option to sue in either Court. In an action of assumpsit, the three defendants must be sued jointly, or the non-joinder might be pleaded in abatement; and it would lead to much inconvenience and expense to search the rolls of the Queen's Bench, in order to ascertain whether all the defendants are officers of that Court, and liable to be sued there. It is quite clear, that when an attorney is either sued in another right, as executor, or jointly with his wife, for a debt contracted by her *dum sola*, he loses his privilege of being sued in the Court of which he is an attorney;

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Robarts v. Mason (a). In that case, *Heath, J.*, lays it down as a general proposition, "An attorney, if sued with another, loses his privilege: otherwise there must be two actions instead of one." To the same effect are the authorities cited in *Bac. Abr.*, tit. "*Privilege*," (B. 3.) Among other cases, *Pratt v. Salt* (b) is there referred to, where an action of trespass had been brought against an attorney of the Court of Common Pleas, and another person, in the King's Bench; and the Court held, that although the nature of the action was several, the plaintiff was not bound to bring several actions; and a respondeat ouster was thereupon awarded.

Channell, Serjt., contra. The demurrer must be overruled. It may be conceded, that an attorney sued with an unprivileged person, could not, according to the old law, avail himself of his privilege; but the reason was, that the attorney must have been sued by bill, and the other party could not have been sued by that mode of proceeding. Two writs, therefore, would have been necessary, and the proceedings would have been open to the objection pointed out by *Heath, J.*, in *Robarts v. Mason* (c). Accordingly, where there was no room for such an objection, as in *Ramsbottom v. Harcourt* (d), it was held, that an attorney did not lose his privilege. In that case, an attorney was sued by bill jointly with a person having privilege of Parliament; and although it was argued, that if the plaintiffs had sued by original, the attorney clearly would not have been allowed his privilege, yet the Court decided, that as the mode of proceeding was by bill, he ought not to be deprived of it. And as now, by the Uniformity of Process Act, 2 Wm. 4, c. 39, the proceedings by bill are done away with, and the writ of summons, in all cases where it is not intended to hold the defendant to special

(a) 1 Taunt. 254.

(b) Hil. 8 Geo. 2.

(c) 1 Taunt. 254.

(d) 4 M. & S. 585.

bail, &c., is substituted for the commencement of personal actions, the reason for depriving the attorney of his privilege when sued with an unprivileged person, no longer exists. Therefore, in *Pitt v. Pocock* (a), where an attorney was sued jointly with an unprivileged person, and was arrested on a writ of *capias*, it was held, that he did not lose his privilege of being free from arrest. Upon the same principle, the Court of Exchequer decided, in *Lewis v. Kerr* (b), that the Uniformity of Process Act did not take away from an attorney the privilege of being sued in his own Court. *Prior v. Smith* (c) is an authority to the same effect. (Serjeant *Scrogg's case* (d), was also referred to.)

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Talfourd, Serjt., in reply. The Uniformity of Process Act only relates to the form of the proceedings, and not to the Court in which a party may or may not be sued. If Kitton, who is an attorney of this Court, as well as of the Court of Queen's Bench, cannot be sued here; because one of his co-contractors is an attorney of the Queen's Bench; the action might be defeated altogether: as Kitton, when sued in that Court, might plead that he was an attorney of the Court of Common Pleas.

TINDAL, C. J.—In this case Kitton, one of the three defendants, is an attorney of this Court; and, therefore, it is perfectly clear that he has no right to move the cause out of this Court into the Court of Queen's Bench. Here he is, an officer of this Court, and here he must remain. Now, it would be a singular thing if, when he cannot remove the cause himself, the other defendant, Dye, should be able to do it for him. The plaintiff has the right of bringing an action in this Court against one of the defendants, and he ought not to have that right taken away because such defendant is joined in the action with another, who, if sued

(a) 2 C. & M. 146.

(c) 6 Dowl. 299.

(b) 2 M. & W. 226. See S. C.

(d) 2 Lev. 129. See S. C.

5 Dowl. 447.

2 Mod. 297.

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alone, might have had the action removed into the Court of Queen's Bench. If it were otherwise, Kitton would be equally entitled to the privilege of bringing it back here. It seems to me that the case stands upon the old rule, that where a privileged person is sued with a person not privileged, he loses his privilege of removing the cause.

COLTMAN, J.—A great hardship would be imposed upon the plaintiff, if from the circumstance of Kitton being an officer of the Court of Queen's Bench, and, therefore, capable of being sued there, the plaintiff were to lose the right of suing him in this Court. It seems to me that he stands here in the situation of an unprivileged person sued with a person privileged to be sued elsewhere; and the case therefore falls within the old rule, which does not appear to me to have been affected by the authorities cited by my Brother *Channell*.

MAULE, J.—I am of the same opinion. What has been relied on for the defendant is, that the Uniformity of Process Act has taken away from attornies the privilege of being sued by a particular form of process; and, therefore, it is argued that the reason for depriving them, when sued jointly with other persons, of the privilege of being sued only in their own Court, has ceased to exist. But the privilege of being sued in a different Court, is quite distinct from that of being sued by a peculiar form of proceeding; and the rule, therefore, remains as it stood before the statute.

ERLE, J.—It appears to me, also, that the general rule of practice is not altered in consequence of the passing of the statute 2 Wm. 4, c. 39. That act only relates to the mode of proceeding, and has no reference to another very different privilege possessed by attornies, that of being sued in the Court to which they belong. It seems to me that the latter privilege remains untouched. If the argu-

ment for the defendant were allowed to prevail, it would be in the power of each one of several co-contractors to insist upon having the cause tried in the Court where he was individually privileged, and thus suspend the action altogether.

Judgment of respondeat ouster.

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NICHOLS v. PAYNE.

ASSUMPSIT for work and labour, and on an account stated.

Plea. That the plaintiff ought not further to maintain his action; because, after the making of the promise, and before the commencement of the suit, to wit, on the 6th of May, 1843, the defendant, then not being a trader within the meaning of the statutes in force relating to bankrupts, and having resided twelve calendar months in London, and having given due notice, duly presented a petition for protection from process to the Court of Bankruptcy, which petition was duly subscribed by the defendant, and contained all such matters and things as were required by the statute in such case made and provided. The plea then went on to allege, that on the presentation of such petition, all the estate and effects of the defendant forthwith became vested in one William Whitmore, the official assignee duly nominated by R. Fane, Esq., the commissioner then acting in the matter of the said petition; that the petition was duly filed; and that after the filing thereof, and after the commencement of the action, the said R. Fane, Esq., then being the commissioner in the said Court of Bankruptcy, to whom the petition had been referred, made a final order

In assumpsit for work and labour, the defendant pleaded, that before action brought, he duly presented a petition for protection from process to the Court of Bankruptcy, under the stat. 5 & 6 Vict. c. 116, whereupon all his estate and effects vested in W., the official assignee; and that after the commencement of the suit, the commissioner made a final order for the protection of the person of the defendant from all process, and for vesting his estate and effects in the said W., the official assignee: *Held*, on special

demurrer, that it was not necessary to allege that the defendant had given notice to his creditors of his intention to present a petition, pursuant to stat. 5 & 6 Vict. c. 116, s. 1; but that the plea ought to shew that the final order was a final order for "distribution," as well as for "protection."

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according to the provisions of the said act, for the protection of the person of the defendant from all process, and for the vesting his estate and effects in the said W. Whitmore, the official assignee duly named by such commissioner. The plea then averred that such order still remained in full force; concluding with a prayer of judgment, whether the plaintiff ought further to maintain his action.

Special demurrer, assigning for causes of demurrer, inter alia, that it did not sufficiently appear from the plea that notice was inserted twice in the *London Gazette*, and some newspaper circulating within the county where the defendant resided; that the plea was ambiguous and informal, for not showing that Fane was a commissioner of the Court of Bankruptcy; that the final order was not shown to be a final order for the distribution of the defendant's effects, or for vesting the estate and effects in Whitmore, the official assignee, together with an assignee chosen by the creditors; and that the plea, if a defence at all, was a bar to the whole action, and ought not to be pleaded to the further maintenance. Joinder in demurrer.

Manning, Serjt., in support of the demurrer. In the first place, the plea ought not to have been pleaded to the further maintenance of the action. That form of plea admits the cause of action, and shows that since the commencement of the suit some fresh matter has arisen which disentitles the plaintiff to recover. [*Erle*, J.—It is so pleaded here. The final order is made a bar by the 10th section of the stat. 5 & 6 Vict. c. 116, and the plea alleges that the final order was made *after* the commencement of the action.] Then, if the Court think the plea good on that ground, it is submitted, secondly, that the allegation of due notice having been given is insufficient. The stat. 5 & 6 Vict. c. 116, s. 1, enacts, “That if any person, not being a trader,” &c., “shall give notice, according to the schedule to this act annexed, to one-fourth in number and value of

his creditors, and shall cause the same notice to be inserted twice in the *London Gazette*, and twice in some newspaper circulating within the county wherein he resides, he may present a petition for protection from process," &c. The plea ought to have averred that the notice was inserted twice in the *London Gazette*, and twice in some newspaper circulating in the county where the defendant resided. [*Tindal*, C. J.—Was it necessary to allege that any notice was given at all? The 10th section of the act makes it enough to say that a petition was presented, and a final order for protection and distribution made by a commissioner.] It does not give any form of plea. [*Tindal*, C. J.—If you take a defence given by an act of Parliament, and plead it in the words of the act, that is enough. The words of the 10th section are, "It shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized," &c.] That section requires that the petition should have been duly presented; and therefore the plea ought to have shown that the defendant had been a petitioner according to the forms of the act. [*Tindal*, C. J.—The 10th section expressly provides, that the production of the final order, signed by the commissioner, with proof of his handwriting, shall be sufficient. It cannot, therefore, be necessary to state all the preliminary proceedings.] Another point is, that it does not appear in the plea, that Mr. Fane, at the time of presenting the petition, and at the time when the defendant's estate became vested in Whitmore, was a commissioner of the Court of Bankruptcy. The plea alleges, that upon the presentation of the petition, all the estate and effects of the defendant became vested in Whitmore, the official assignee duly nominated by R. Fane, Esq., the commissioner then acting in the matter of the said petition. Mr. Fane might have acted by intrusion. The last objection is, that the plea does not show that the final order made was a final order for distribution according to the provisions of the act. It

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does not allege that there was any order for distribution at all; but merely states that an order was made for the protection of the person of the defendant from all process, and for vesting his estate and effects in the official assignee. [*Maule, J.*—The 4th section of the statute says, that the final order shall be “for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee,” “together with an assignee to be chosen by the majority in number and value of the creditors.” The plea says nothing about the creditors’ assignee.]

The *Court* then called on *Talfourd*, Serjt., to answer the last objection, and leave was given to amend, on payment of costs (a).

(a) See *Leaf v. Robson*, *post*, p. 646.

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Hilary Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

JAMES KILBURN v. WILLIAM KILBURN.

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ASSUMPSIT. The declaration contained counts for goods sold and delivered, money had and received, money paid, and money found to be due on an account stated. Pleas. Non assumpsit, payment, and set-off.

A declaration contained counts for goods sold, money had and received, money paid, and money due on an account stated. The defendant pleaded non assumpsit, payment, and set-off.

After issue joined, the cause and all matters in difference were referred by agreement to two arbitrators, the costs of the cause to abide the event of the award, and the costs of the agreement and of the award to be in the discretion of the arbitrators. The arbitrators awarded that the said William Kilburn was, before and at the time of the commencement of the said action, and still was, justly and truly indebted to the said James Kilburn in the sum of 68*l.* 11*s.* 5*d.*; and that final judgment should be entered up for the plaintiff for the said sum of 68*l.* 11*s.* 5*d.*, besides his costs of suit to be taxed by the Master; and that the said sum of 68*l.* 11*s.* 5*d.*, with such costs as aforesaid, shall be paid by the defendant to the plaintiff, on, &c. The award then directed the costs of the agreement and reference to be paid by the parties in equal moieties.

After issue joined, it was agreed that all proceedings in the action should be stayed, and the action and all matters in difference referred to two arbitrators, the costs of the action to abide the event of the award.

The arbitrators awarded that the defendant

was indebted to the plaintiff in a certain sum, and directed final judgment to be entered for the plaintiff for that sum: *Held*, that the award was bad, there being no specific finding upon the issues raised on each of the counts in the declaration, by the plea of non assumpsit.

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A rule had been obtained, calling on the plaintiff to shew cause why the award should not be set aside, on the ground that it was uncertain, and did not dispose of the issues in the cause.

Cowling shewed cause. Although the award is not formally drawn up, the arbitrator has in effect determined all the issues; for he has found that the plaintiff is entitled to recover, and he directs that final judgment shall be entered up for the plaintiff. The case of *Bourke v. Lloyd* (a) is distinguishable; for there the action was referred by a Judge's order, and there was no provision about final judgment; consequently the only event upon which the costs could be taxable, was a specific finding upon each issue. But in this case, the arbitrator has only to say in whose favour judgment is to be entered up, and the costs will be determined accordingly. The case of *Brooks v. Parsons* (b), which will be relied on by the other side, can scarcely be supported. In *Harding v. Forshaw* (c), the cause and all matters in difference were referred to arbitration, the costs to abide the event as upon a trial at law, and final judgment to be entered up thereon by either party. The arbitrator awarded that the plaintiff had no cause of action, and ordered the plaintiff to pay a sum of money to the defendant; but (he added) it was not intended to prevent the plaintiff from recovering upon an agreement signed by the defendant, but that at present he had no cause of action; and the award was held sufficient. The present case resembles *Waddle and Another v. Downman* (d), where the submission contained a stipulation that if the arbitrator should find that the plaintiff was not entitled to recover any debt or damages, then a verdict was to be entered for the defendant, the costs of the cause to abide the event of the award;

(a) 2 Dowl. 452, N. S.; S. C. 1 M. & W. 415.

10 M. & W. 550.

(d) *Ante*, vol. 1, p. 560. See

(b) *Ante*, vol. 1, p. 691.

12 M. & W. 562.

(c) 4 Dowl. 761. See S. C.

and it was held that the arbitrator was not bound to find distinctly upon each issue. [*Parke*, B.—There the parties by their own contract had fixed the authority of the arbitrator, and dispensed with the necessity of a specific finding upon each issue.] The case of *Cooper v. Langdon* (a) shews that there is no inconsistency in this award. In *Dicas v. Jay* (b), the declaration contained eleven counts, and the arbitrator having found that the plaintiff had a good cause of action for a certain sum for which he directed a verdict to be entered, the award was held good. The case of *Pearson v. Archbold* (c) was decided on the ground that consistently with the award, the plaintiff might have succeeded on some of the issues, and the defendant on others.

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Pashley, in support of the rule. Where the costs of the cause are dependent on the event, there must be a specific finding on each issue. In *England v. Davison* (d) there were several issues, and the arbitrator awarded that the plaintiff had no cause of action, and directed a verdict for the defendant; and the award was held bad. So where the cause referred contained a count on a promissory note, and also a count on an account stated, and the arbitrator found that the plaintiff had good cause of action for, and was legally entitled to recover from the defendant, the amount of the promissory note mentioned in the pleadings; the award was held bad, there being no adjudication upon the other issue; *Gisburne v. Hart* (e).

Cur. adv. vult.

The judgment of the Court was now delivered by
POLLOCK, C. B.—This was an application to set aside an

- (a) 1 Dowl. 392, N. S.; S. C. 11 M. & W. 477.
9 M. & W. 60. (d) 9 Dowl. 1052.
(b) 1 Bing. 281. See S. C. (e) 7 Dowl. 402. See S. C.
2 M. & P. 448. 5 M. & W. 50.
(c) 2 Dowl. 1018, N. S.; S. C.

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award, the objection to the award being that it had not disposed of all the issues. The costs of the cause were to abide the event. There were three pleas; non assumpsit, payment, and set-off; and there were three counts, to all of which non assumpsit was pleaded. The objection was, that it did not appear on the face of the award that the arbitrator had disposed of all the issues. Now the cases certainly have laid it down, and we accede to the law as so laid down, that where the costs of the cause are to abide the event of the award, the award must either dispose specifically of each issue, or it must be clearly inferred from it in what way each of these issues should be found, so as to enable the officer to tax the costs of the party, in whose favour each issue is found. In this case there were three issues; non assumpsit, payment, and set-off: and it is argued, that the award is in substance only this, that the defendant ought to pay a certain amount, and that the judgment shall be entered for the plaintiff for that amount. Now, it is clear that this determines two of the issues on the record. The plea of payment means that the defendant has paid all the plaintiff demands; and the plea of set-off, that he has a set-off to the full amount. The finding of the arbitrator, therefore, clearly disposes of the two issues on the plea of payment and the plea of set-off. But the difficulty as to the plea of non assumpsit is this; the declaration consists of several counts, and the plea of non assumpsit is a denial of the liability of the defendant on each count. Now the award does no more than determine that on some one or more of the counts in the declaration the defendant was liable; it does not necessarily, or even reasonably, determine that he is liable on all; nor does it determine each so as to be equivalent to an express determination of the whole issue of non assumpsit. We think, therefore, that if there were nothing more in the terms of the reference, the objection to the award on the decided cases must prevail. We have, however, taken time to consider, for the purpose of ascertaining whether there are any

special circumstances in this reference, and in the award which will distinguish it from the cases which have been already decided; but we cannot find any sufficient ground to justify us in distinguishing it from those cases, by which we think it ought to be governed. The rule, therefore, for setting aside the award must be made absolute.

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Rule absolute (a).

(a) The same point was decided in a case of *Morgan v. Thomas*, in this Court, in the same Term.

KING v. HOPKINS.

IN this case, a rule had been obtained, calling on the plaintiff to shew cause why the writ of summons, copy and service thereof, should not be set aside for irregularity, with costs. The writ was directed to "Thomas Hopkins, of Wilson Street, Finsbury, in the city of London." The application was made upon affidavit, which stated that Wilson Street, Finsbury, was in the county of Middlesex, and not in the city of London.

A writ of summons was left at the defendant's residence, in which he was described as of "Wilson Street, Finsbury, in the city of London." Upon affidavit that Wilson Street was in the county of Middlesex, and not in the city of London; the Court set aside the writ; notwithstanding that the defendant had not been personally served.

Bramwell showed cause. There is an affidavit of the plaintiff's attorney, in which he states, that, at the time he filled up the writ, he believed and *supposed* that Wilson Street, Finsbury, was in the city of London. The Uniformity of Process Act, (2 Wm. 4, c. 39, s. 1.) enacts, that "in every such writ, and copy thereof, the place and county of the residence, or supposed residence, of the party defendant, or where the defendant shall be, or shall be supposed to be, shall be mentioned." The provisions of that statute have been complied with; inasmuch as it appears, from the affidavit, that Wilson Street was *supposed* to be in the city of London. In *Jelks v. Fry* (a), "Yorkshire"

(a) 3 Dowl. 37.

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was held to be a good description of a defendant's residence; although he resided at Kingston upon Hull, which is a county of itself. [*Pollock*, C. B.—That is different: in common parlance, Hull is in Yorkshire.] In that case, it was also held that “Gray's Inn, London,” was a sufficient description of the attorney's residence, although Gray's Inn is not in the city of London. Where a defendant's place of abode is unknown at the time of issuing the writ, it is sufficient to insert the last known place of abode, *Norman v. Winter* (a). [*Pollock*, C. B.—That was a correct description of a supposed residence: this is an incorrect description of an actual residence. *Alderson*, B.—The writ must correctly describe the place and county of the defendant's residence, or supposed residence. This case resembles *Lewis v. Newton* (b), in which the Court say, that if there had been a distinct affidavit that Symond's Inn was not in the city of London, the writ would have been bad.] In *Windam v. Fenwick* (c), *Parke*, B., says, that the description of a defendant's residence is immaterial, “he may be supposed to have lived there.” [*Parke*, B.—This defendant never could be supposed to be residing in Wilson Street in the city of London; because there is no such place.] At all events, the defendant is not in a situation to make this application; for it appears by affidavit that he was never served with a copy of the writ; but that he kept out of the way, to avoid service, and the copy was left at his residence, with the view of applying for a distringas. The defendant cannot treat that as a service, for the mere purpose of applying to set the writ aside. [*Parke*, B.—There is no doubt he is the person mentioned in the writ: he in fact says that he is the defendant, but he does not live there.]

T. W. Saunders, in support of the rule. In *Hill v.*

(a) 5 Bing. N. C. 279. See S. C. 4 Dowl. 355.
 S. C. 7 Scott, 251; 7 Dowl. 304. (c) 11 M. & W. 102. See
 (b) 2 C., M. & R. 732. See S. C. 2 Dowl. 783, N. S.

Harvey (a), Lord *Abinger*, C. B., says, "In the clause giving the writ of summons, the precise and immediate place of the party's residence is clearly made essential to be stated; and the reason is good,—that being addressed to the party, it is to be served upon him, and he is to do the act consequent upon it, namely, to enter an appearance." Unless the residence be correctly stated, it may be doubted whether the party served is the party intended to be made defendant. *Lewis v. Newton* (b) is precisely in point.

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POLLOCK, C. B.—The rule must be absolute. The act of Parliament requires that the county of the defendant's residence, or supposed residence, shall be stated: here it is clear that a wrong county is stated; and in the case of *Lewis v. Newton*, where the description was "Symond's Inn, Chancery Lane, in the city of London," my Brother *Parke* says, "The act imports that the description of the defendant's actual or supposed residence shall be correctly stated. If it had appeared distinctly that Symond's Inn was not in the city of London, the writ would be bad." Here it does distinctly appear that the place of residence is not within the city of London.

PARKE, B.—I am of the same opinion.

ALDERSON, B.—You may suppose the defendant to reside where you please, but you must describe his supposed residence correctly.

ROLFE, B., concurred.

Rule absolute.

(a) 2 C., M. & R. 309. See
S. C. 4 Dowl. 163.

(b) 2 C., M. & R. 732. See
S. C. 4 Dowl. 355.



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PARRY v. NICHOLSON.

An alteration in a bill of exchange, which does not render a new stamp necessary, cannot be given in evidence under the plea of non accepit; but the fact must be specially pleaded.

ASSUMPSIT by indorsee against acceptor of a bill of exchange. The declaration stated that one J. Trevethan, on the 22nd day of March, A. D. 1844, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said J. Trevethan, 250*l.*, three months after the date thereof (which period had elapsed before the commencement of this suit), and the defendant then accepted the said bill, and the said J. Trevethan then indorsed the same to one M. J. Cooke, and the said M. J. Cooke then indorsed the same to the plaintiff, &c.

Plea, non accepit modo et formâ.

At the trial, before *Gurney*, B., at the Lewes Summer Assizes, 1844, the bill having been produced, it was objected on the part of the defendant, that the date had been altered from the 2nd to the 22nd day of March. It was replied on the part of the plaintiff, that the defence was not available under the plea of non accepit, but should have been specially pleaded. The learned Judge was of opinion that a special plea was unnecessary, and directed the jury to find for the defendant if they were of opinion that the bill had been altered since its acceptance. The jury having found for the defendant, a rule nisi was obtained to set aside the verdict, against which,

Montagu Chambers and *Hance* shewed cause. The defendant was at liberty, under the plea of non accepit, to prove that the bill had been altered since its acceptance. The effect of the alteration was to make it a new bill; the proper mode, therefore, of raising the objection was, to plead that the defendant did not accept the bill, which the plaintiff declared on. The plaintiff produced in evidence a bill dated the 22nd of March; but the bill which the defendant accepted was a bill dated the 2nd of March. In

Calvert v. Baker (a), it was held that the alteration in a bill of exchange, after acceptance, need not be pleaded specially. [Parke, B.—*Calvert v. Baker*, is not an authority to that extent, and can only be supported on the ground that the alteration rendered a new stamp necessary. That is not the case here, for the bill being payable at three months, it is immaterial whether it was made on the 2nd or the 22nd of March.] At common law, an instrument is destroyed by an alteration in it; *Master v. Miller* (b). [Alderson, B.—If the instrument be bad at common law, the defence ought to be specially pleaded. Before the new rules the defence was, in fact, pleaded under non assumpsit]. The case of *Calvert v. Baker* has been followed by other cases to the same effect; *Field v. Woods* (c), *Knight v. Clements* (d), *Clifford v. Parker* (e), *Crotty v. Hodges* (f). [Parke, B.—Those cases are not authority since the case of *Hemming v. Trenery* (g), which we have twice acted upon; namely in *Mason v. Bradley* (h), and *Davidson v. Cooper* (i).]

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Shee, Serjt., was not called on to support the rule.

PARKE, B.—The rule must be absolute. It is enough to say that we concur in the decision of *Hemming v. Trenery* (k), and have no doubt whatever on the point. If we were to deliver a formal judgment, it would only be a repetition of the language used by the Court in *Mason v. Bradley* (l), and *Davidson v. Cooper* (m).

Rule absolute.

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| (a) 4 M. & W. 417; See S. C. | 1 P. & D. 661. |
| 7 Dowl. 17. | (k) <i>Ante</i> , Vol. 1, p. 380; S. C. |
| (b) 4 T. R. 320. | 11 M. & W. 590. |
| (c) 7 A. & E. 114; See S. C. | (i) <i>Ante</i> , Vol. 1, p. 377; S. C. |
| 2 N. & P. 117; 6 Dowl. 23. | 11 M. & W. 778. |
| (d) 8 A. & E. 215; See S. C. | (k) 9 A. & E. 926; See S. C. |
| 3 N. & P. 375. | 1 P. & D. 661. |
| (e) 2 M. & G. 909; See S. C. | (l) <i>Ante</i> , Vol. 1, p. 380; S. C. |
| 3 Scott, N. R. 233. | 11 M. & W. 590. |
| (f) 4 M. & G. 561; See S. C. | (m) <i>Ante</i> , Vol. 1, p. 377; S. C. |
| 5 Scott, N. R. 221. | 11 M. & W. 778. |
| (g) 9 A. & E. 926; See S. C. | |

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ASKENHEIM v. COLEGRAVE.

An affidavit to hold to bail under the 1 & 2 Vict. c. 110, stated "that the defendant was a lieutenant in the 78th regiment of foot, which regiment is under orders to embark for India, and deponent believes and has no doubt that it is the intention of the defendant to embark with his regiment and quit England on military service for India." Held, sufficient.

THE defendant, in this case, had been arrested, by virtue of an order made by *Rolfe*, B., under the 1 & 2 Vict. c. 110, s. 3. The affidavit in support of the order, after alleging that the defendant was justly and truly indebted to the deponent, in the sum of 55*l.*, for money lent, goods sold, &c., proceeded thus: "And this deponent further saith, that the defendant was formerly a lieutenant in her Majesty's Eighty-seventh Regiment of Foot, and is now a lieutenant in her Majesty's Seventy-eighth Regiment of Foot, called the Seventy-eighth Highlanders, which said last-mentioned regiment is under orders to embark for India: and this deponent believes, and has no doubt, that it is the intention of the defendant to embark with his said regiment, and quit England on military service for India: and that he is expected to remain there a considerable time: and unless he is forthwith apprehended at the suit of this deponent, this deponent will lose, and be deprived of the means of recovering his said debt."

D. D. Keane moved for a rule nisi to rescind the order. First, the statute 1 & 2 Vict. c. 110, s. 3, was never intended to apply to the case of military officers quitting the country, for foreign service, under orders from the Sovereign. Secondly, the affidavit, on which the order was made, is insufficient; inasmuch as it does not state the source of the deponent's information, that the defendant was about to embark for India. In *Gibbons v. Spalding* (a), *Parke*, B., says, "There is, however, this limitation to hearsay evidence, that no Judge ought to make an order of this description, merely, upon the plaintiff's swearing that he is informed, and believes that the defendant is about to leave the country; the plaintiff should be required to state

(a) 2 Dowl. 813, N. S.; See S. C. 11 M. & W. 173.

in his affidavit the name of the person giving him that information." [*Alderson*, B.—That is where the defendant is a private individual, and it is only stated generally, that, in the belief of a particular party, he is about to quit the country. Here, the affidavit states positively, as a fact, that the defendant's regiment is under orders for India; and that fact is stated with sufficient precision, to support an indictment for perjury, if it should turn out to be false. If the defendant is not going abroad, he may easily show that by the other officers.] There is an affidavit made by the defendant's attorney, which states that, from inquiries made by him at an army agent's, he found that the Seventy-eighth Highlanders were not under orders to embark for India; and that he was informed, and believed it to be true, that the said regiment was then, and had been for some time past, at Sukkur, in Scinde, in the East Indies.

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POLLOCK, C. B.—The affidavit is *primâ facie* sufficient to warrant the holding of the defendant to bail. It is something more than hearsay evidence; for the affidavit states positively that the defendant is a lieutenant in the Seventy-eighth Highlanders, and that the regiment is under orders to embark for India. That is certainly sufficient; although the plaintiff afterwards speaks only to his *belief*, that the defendant is about to embark with his regiment. The 1 & 2 Vict. c. 110, s. 3, authorizes a Judge to make an order, when he is satisfied that there is probable cause for believing that the defendant is about to quit England. Then the affidavit being *primâ facie* sufficient, the defendant does not deny that he is about to embark with his regiment; and even if he did, the Court might not be disposed to act on such a contradiction, after the party has been once held to bail.

ALDERSON, B.—There can be no doubt about the sufficiency of the affidavit.

Rule refused.

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DOE d. BURNHAM v. LEVER.

(Coram Rolfe, B., sitting alone).

Where in
ejectment the
lessor of the
plaintiff is
ruled to reply,
it is irregular
to deliver the
similiter with-
out the consent
rule.

A DECLARATION in ejectment, in a country cause, having been served, the defendant, before judgment against the casual ejector (*a*), obtained permission to come in and defend as landlord; and thereupon he entered into the usual agreement for the common consent rule to confess lease, entry, ouster, and possession. The agreement and plea were duly delivered to the attorney for the lessor of the plaintiff. On the 21st of January, the defendant served a rule to reply, and on the 24th, the lessor of the plaintiff delivered the similiter, without serving a copy of the consent rule, which had not, in fact, been drawn up.

Hayes had obtained a rule, calling on the lessor of the plaintiff to shew cause why the replication should not be set aside for irregularity, with costs.

Barstow shewed cause, and produced an affidavit that it was always the intention of the lessor of the plaintiff to

(*a*) By rule of Hilary Term, 4 Vict. "It is ordered, that a party entitled to appear to a declaration in ejectment may appear and plead thereto at any time after service of such declaration, and before the end of the fourth day of the Term in which the tenant is required by the notice to appear, in town causes, and before the end of the fourth day after the Term in which the tenant is required by the notice to appear, in country causes, and may proceed to compel the plain-

tiff to reply thereto, or may sign judgment of non pros., notwithstanding such plaintiff may not have obtained a rule for judgment on such service of declaration. And that a plaintiff who may have omitted to obtain a rule for judgment within the time prescribed by the present rules and practice, shall be entitled, on production of such plea, to an order of a Judge for leave to draw up a rule for judgment as of the time at which such rule for judgment would have been obtained."

go to trial at the next assizes. That the agent for the lessor of the plaintiff had never been requested by the defendant or his attorney to draw up the consent rule, or he would have immediately done so. That he never had any intention to deprive the defendant of the benefit of the consent rule, and that he has now drawn up such rule. That the practice is to draw up the consent rule immediately before delivering the issue, with notice of trial, and to annex copies thereof to such issue when delivered. The defendant has no right to complain of the irregularity, for he serves a rule to reply, entitled *Doe d. Burnham v. Lever*, when, in truth, there was no such cause, until the consent rule was drawn up. He ought, in the first instance, to have required the plaintiff to draw up the consent rule, and if he refused, to have applied to the Court to compel him. *Doe d. Blayney v. Savage (a)*, will probably be relied on by the defendant; but in that case the lessor of the plaintiff had been applied to and refused to draw up the consent rule, and the judgment of the Court proceeded on that ground. Besides, in that case, the rule was in the alternative to set aside the replication, or sign judgment of non pros., unless the consent rule was drawn up within a week. Lord *Denman*, in delivering judgment, there says, "We think that the defendant is entitled to have the consent rule drawn up in order that the lessor of the plaintiff may become amenable to him in costs, if he does not prosecute the suit." The same reason does not exist here, for, upon the service of this rule the consent rule was drawn up.

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Hayes, in support of the rule. The rule to reply, in effect requires the plaintiff to reply in the proper mode, by drawing up and delivering the consent rule, together with the similiter. The defendant had a right to have the consent rule delivered; for without it, he was no party to the suit. *Doe d. Blayney v. Savage*, must govern this case; and there it was expressly decided that the delivery

(a) 4 Q. B. 416.

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of a replication, without the consent rule was irregular. It is urged that there has been no refusal by the lessor of the plaintiff to draw up the consent rule; but he was bound to do so before he took any further step in the cause.

ROLFE, B.—The rule must be absolute. This case is not distinguishable from *Doe d. Blayney v. Savage* (a). It seems to me that the fact of the lessor of the plaintiff having in that case refused to draw up the consent rule makes no difference. Until the consent rule is drawn up, the lessor of the plaintiff is no party to the cause, and what right can such a person have to reply? It is true that the general practice is to deliver the consent rule with the issue: and that is quite correct; for, in most cases, the plaintiff at once adds the similiter, and makes up the issue. In this case, he has been ruled to reply, and he then delivers a replication without the consent rule. That is clearly an irregularity.

Rule absolute.

(a) 4 Q. B. 416.

LEAF v. ROBSON.

To assumpsit by indorsee against acceptor of a bill of exchange, the defendant pleaded that she delivered the bill to C. for a special purpose, and that C., in violation of good faith, and contrary to the said special purpose, delivered the bill

ASSUMPSIT by indorsee against acceptor of a bill of exchange, drawn by J. Stonehouse upon, and accepted by the defendant, and indorsed by J. Stonehouse to C. Stonehouse, and by him to the plaintiff.

The defendant pleaded fourthly, that there was not at any time, any value or consideration for the defendant's accepting or paying the said bill of exchange; and that the bill so indorsed by John Stonehouse, was afterwards, on, &c., delivered on behalf of the defendant to C. Stonehouse, for a special purpose only, to wit, that C. Stonehouse should

to the plaintiff; that the plaintiff, at the time of the delivery, had notice of the premises; and that there was no consideration for the indorsement to the plaintiff: *Held* bad, for duplicity.

A plea of the defendant's discharge from a debt, under the 5 & 6 Vict. c. 116, must either follow strictly the words of the 10th section, or set out the proceedings at length.

keep and take care of the said bill for the use and benefit of the defendant, and not for the purpose of being negotiated or delivered over by him to any other person; that C. Stonehouse then received and held the said bill for the special purpose aforesaid; and that in violation of good faith, and contrary to the said special purpose, to wit, on, &c., fraudulently, and with intent to defraud the defendant, the said C. Stonehouse negotiated and parted with the said bill, and then delivered the same to the plaintiff; that the plaintiff, at the time when the said bill was so delivered to him, had notice of the premises, and well knew that the said C. Stonehouse had no power or authority to negotiate or part with the same on his own account; and that there was not at any time any consideration or value given for the indorsement to the plaintiff. Verification.

Fifth plea; that heretofore, to wit, on, &c., she, the defendant, in pursuance of an act of Parliament, (5 & 6 Vict. c. 116,) entitled "An Act for the Relief of Insolvent Debtors," presented a petition to the commissioners of the Leeds District Court of Bankruptcy, (in which district she, the defendant, had resided twelve calendar months,) praying to be protected from all process whatever, either against her person, or property of any description, and that she, the defendant, might have such further and other relief as by the said statute is provided, and as the said Court should think fit; and such proceedings were thereupon had, that afterwards, to wit, on, &c., a certain order was then made by Montague Baker Bere, Esq., then being her Majesty's commissioner of bankruptcy for the Leeds district, and acting in the matter of the said petition for the protection of the person of the said defendant from all process, and for the vesting of the estate and effects in Charles Fearn, official assignee, named by the said commissioner: whereby and by reason of the premises aforesaid, and by force of the said statute, the said defendant was discharged of and from the premises and causes of action in the declaration mentioned; and the said order and discharge still remain in full force. Verification.

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Special demurrer to the fourth plea. The causes assigned were, that the plea sets forth two grounds of defence; first, that the plaintiff had notice of the premises and matters in that plea mentioned; and secondly, that there was no consideration or value for the indorsement of the bill to the plaintiff.

Special demurrer to the fifth plea, assigning for causes, that it did not set forth with the proper requisites, the presenting of the said petition for such protection, nor how the defendant prayed to be protected, nor stated that the said period of twelve months, was twelve months next before the presenting of such petition, or next before the making of the said order, or otherwise; that the said plea should have shewn, whether the defendant was a trader or not, and if a trader, whether her debts amounted to less than 300*l.*; that it was not alleged, that the defendant gave such notice as in the said act of Parliament mentioned, or caused the same to be advertised in manner therein mentioned; that the mode of pleading adopted in the plea, by a taliter processum est, was insufficient and improper, for that the said proceedings should have been set forth; and for that the said plea did not shew that the requisites of the statute had been complied with, nor that the bill of exchange, and the debt due to the plaintiff in respect thereof were due or in existence at the time of the said petition and discharge; and for that the said bill might have been accepted since that time; and for that the said order of the said commissioner should have been stated and set forth, and the Court thereby enabled to judge of its sufficiency.

Humfrey, in support of the demurrers, was stopped by the Court.

H. Hill, *contra*. The fourth plea is not double; the allegation that there was no consideration for the indorsement, amounts to no more than is stated in the averment; namely, that the plaintiff had notice of the premises. If a

fraud has been practised upon any party, the plaintiff cannot recover, unless he is a bonâ fide holder for value, and the only way to impeach his title, is to shew that he had notice of the fraud. [*Parke*, B.—Could not that be proved under the allegation, that there was no consideration for the indorsement to the plaintiff? *Alderson*, B.—Suppose the defendant proves that she delivered the bill to C. Stonehouse for a special purpose, and also shews that between C. Stonehouse and the present plaintiff no consideration passed, would not that support the plea? Or suppose you prove all the circumstances relating to the special agreement, and the plaintiff's knowledge of it at the time, would not that also support the plea?] (*Hill* then asked leave to amend.)

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As to the demurrer to the fifth plea, the question arises upon the 10th section of the 5 & 6 Vict. c. 116, which enacts, "that if any suit or action is brought against any petitioner, for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order, signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." It is conceded, that the plea does not follow the very words of the act; but it shews that the requisites of the statute have been complied with.

PARKE, B.—The plea is clearly bad. It should either follow the very words of the 10th section, or it must fully set out the proceedings, and so shew that the requisites of the statute have been complied with. The defendant may have leave to amend both pleas, otherwise there will be judgment for the plaintiff.

Judgment accordingly (a).

(a) See *Nichols v. Payne*, ante, p. 629.

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Ex parte PARTINGTON.

A party in execution who has petitioned and obtained an interim order for protection under the 7 & 8 Vict. c. 96, may be afterwards remanded to his former custody by the commissioner; although the case does not fall within the 24th section of that act.

The proviso at the end of the 28th section is not a general provision, that every one who has been in prison for debt for twelve months shall be discharged; but only limits to that period, the imprisonment after the final order is refused, or indefinitely postponed, or the interim order is not renewed.

A prisoner who sues out a writ of habeas corpus ad subjiciendum, is not bound by the decision of any one Court; but is entitled to take the opinion of all, as to the propriety of his imprisonment.

IN July, 1841, W. Partington was taken in execution by the sheriff of Middlesex, at the suit of one Ubanke. Two detainers were afterwards lodged against him, on one of which the debt exceeded 300*l*. On the 30th of June, 1842, Partington petitioned the Court for the Relief of Insolvent Debtors, but did not proceed to file his schedule. In August, 1842, not being a trader within the bankrupt laws, he presented a petition, under the 7 & 8 Vict. c. 96, and an interim order was made, under the 6th section, by Mr. Commissioner Evans, for the protection of his person, until the 27th of September, by virtue of which he was discharged from custody. At the expiration of the interim order, the petition came on to be heard, when the learned commissioner refused the final order, and remanded the petitioner to his former custody; on the ground that, as he had petitioned the Court for the Relief of Insolvent Debtors, all his property had vested in the provisional assignee of that Court. He was accordingly taken by the officer of the Court of Bankruptcy, and by him delivered over to the custody of the keeper of the Queen's prison. In the course of last Term, Partington was brought up by writ of habeas corpus, issued out of the Court of Queen's Bench; but being opposed by the execution creditors, that Court, after argument, refused to discharge him. He afterwards sued out a writ of habeas corpus, returnable before the Lord Chief Baron at Chambers, but that learned Judge had also refused his discharge.

Peacock now moved this Court for a writ of habeas corpus. The question depends upon the construction of the recent act, 7 & 8 Vict. c. 96, which enables debtors to petition the Court of Bankruptcy for protection from process. The 3rd section, requires a notice to be given to the creditors whose debts shall amount to five pounds. By the

4th section, the property of the petitioner vests in the assignees for the time being. The 5th section gives the commissioner the same power for seizure of the property of the petitioner, and examination of him, as in cases of bankruptcy. Under the 6th section (*a*), the petitioner can only be taken again in execution by the creditors, under a fresh writ issued on the judgment; or at least, by directing the sheriff to retake him upon the old writ. The power of the commissioner to remand, depends upon the 24th section (*b*).

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(*a*) Sect. 6. "That any prisoner in execution upon any judgment obtained in any action for the recovery of any debt, either not being a trader within the meaning of the statutes relating to bankrupts, or being a trader within the meaning of the said statutes owing debts amounting on the whole to less than three hundred pounds, may be a petitioner for protection from process; and every such petitioner to whom an interim order for protection shall have been given shall not only be protected from process, as provided by the said recited act, but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule; and if any such petitioner, being a prisoner in execution, shall be detained in prison in execution upon any such judgment, it shall be lawful for the commissioner to order any officer who shall have such petitioner in custody by virtue of such execution to discharge such petitioner out of custody as to such execution, without exacting any fee, and such officer shall hereby be indemnified for so doing; and no

sheriff, gaoler, or other person whatsoever shall be liable to any action as for the escape of any such prisoner by reason of such his discharge; and such petitioner so discharged shall be protected by his interim order from all process for such time as the commissioner shall by such interim order or any renewal thereof think fit to appoint, until the making of the final order for protection, in the same manner as if such petitioner had not been a prisoner in execution: provided always, that after the time allowed by any such interim order or any renewal thereof (as the case may be) shall have elapsed such petitioner shall not by such discharge be protected from being again taken in execution upon such judgment, but such judgment shall remain in full force and effect notwithstanding such discharge."

(*b*) Sect. 24. "That if on the day for the first examination of the petitioner, or at any adjournment thereof, it shall appear to the commissioner that the debts of the petitioner, or any of them, were contracted by any manner of fraud or breach of trust, or by any prosecution whereby he had

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This petitioner has not been remanded for any of the causes mentioned in that section; and the fact of his having petitioned the Insolvent Court, is no justification of the remand, if all his property has been fairly and honestly assigned to the provisional assignee. Assuming that, in consequence of the commissioner having refused the order, the petitioner is again liable to be sent to prison, that could only be done by the execution creditors; whereas, in this case, he has been taken back to prison by the officer of the commissioner. The sheriff has no right to detain a prisoner, who has come into his custody by unlawful means; *Pearson v. Yewens (a)*, *Robinson v. Yewens (b)*. Besides, the 28th section contains a proviso, "that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition, in case the final order shall be refused or shall not be made, or in case the protecting order shall not be

been convicted of any offence, or without having at the time a reasonable or probable expectation of being able to pay such debt or debts, or that such debts, or any of them, were contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat of bankruptcy, or malicious trespass, or that the petitioner has parted with any of his property since the presenting of his petition, the commissioner shall not be authorized in any such case to name any day for making such final order, or to renew such interim order; and in every such case wherein any such petitioner shall have been a

prisoner in execution, and discharged out of custody by order of the commissioner under the provision herein in that behalf contained, *such petitioner shall be remanded by an order of the commissioner to his former custody; but if none of the matters aforesaid shall so appear*, and the commissioner shall be satisfied that the petitioner has made a full discovery of his estate, effects, debts, and credits, it shall then be lawful for the commissioner to cause notice to be given that on a certain day, to be named therein, he will proceed to make such final order, unless cause be shewn to the contrary."

(a) 7 Dowl. 451; S. C. 5 Bing. N. C. 489; 7 Scott, 435.

(b) 7 Dowl. 377; S. C. 5 M. & W. 149.

renewed." [Parke, B.—That proviso only extends to the section which authorizes the commissioner to remand.

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Alderson, B.—The meaning of the proviso is, that where a party gets back into prison, because he is remanded, he shall not remain in prison more than twelve months. What would be the use of the proviso at all, if the antecedent period of imprisonment entitled him to go out?]

PARKE, B.—We will take an opportunity of looking into the act of Parliament. The cases of *Robinson v. Yewens* (a), and *Pearson v. Yewens* (b), do not apply; for the party here is not re-delivered into custody by the act of the sheriff. On an application for a habeas corpus, we are bound to decide the party's right to the writ; and although the matter has already been before another Court, still in favour of liberty, the prisoner is entitled to have the opinion of each Court.

Cur. adv. vult.

The judgment of the Court was delivered by

PARKE, B.—An application was made by Mr. Peacock, for the discharge of a defendant who was in custody, in execution, for more than 300*l.*; and who had in August last filed his petition, under the 6th section of the 7 & 8 Vict. c. 96. It appears, that an interim order was made for his protection, and that he was discharged out of custody by the learned commissioner, Mr. Evans. But when the case was heard, on the 27th of September, (the day pre-fixed), the commissioner refused the final order, and remanded him into custody, as if the interim order had not been made; being of opinion that he was not entitled to the benefit of the act, as he had previously, in the year 1842, petitioned the Court for the Relief of Insolvent Debtors, and all his estate was vested in the provisional assignee of

(a) 7 Dowl. 451; S. C. 5 Bing. N. C. 489.

(b) 7 Dowl. 377; S. C. 5 M. & W. 149.

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that Court, and could be dealt with according to the provisions of that act. The application for a habeas corpus was made on three grounds; first, that the commissioner had no power to remand in this case, it not being one in which he is directed to remand, under the 24th section; secondly, that upon the refusal of the final order, the defendant could only be taken in execution by the creditors under the 6th section, by a fresh writ, or by ordering the sheriff to take him again under the old writ; thirdly, that under the 28th section, the defendant who has already been in execution for more than twelve months, could not be detained any longer. The case has already been before the Court of Queen's Bench, on the return to a habeas corpus; and before my Lord Chief Baron, at Chambers, on a subsequent application, for a similar writ. In both instances, the discharge was refused. The defendant, however, had a right to take the opinion of this Court as to the propriety of his imprisonment; and therefore we have thought it proper to examine attentively the provisions of the statute, without considering ourselves as concluded by these decisions. But we are all of opinion, that the defendant is not entitled to his discharge; and we entirely agree in the judgment of the Court of Queen's Bench, which was approved by the Lord Chief Baron, and are satisfied of the correctness of the reasons, stated to us to have been assigned by Lord Denman, for that judgment. The right of remanding, as if the interim order had not been issued, does not depend upon the 24th section, which is compulsory in all the cases therein mentioned; but is incident to the jurisdiction to grant the interim order given by the statute to the commissioner; who, if he finds that he has granted an order *ex parte*, which he is satisfied he ought not to have done, must have a right to revoke that order, and place the defendant in the situation in which he was before, and where he ought to have remained. The commissioner, therefore, when he discovered that the defendant was not entitled to the benefit of the act, was

perfectly right in not merely rescinding the order, but in ordering him to be remanded, and placing him in the same situation in which he was when the interim order was obtained. In this view of the case, it is unnecessary to give any opinion on the second objection. The third, we also think untenable. The proviso at the close of the 28th section, is not a general provision that every one who has been in prison for debt for twelve months shall be discharged; but is a proviso ingrafted on the discretionary power given to the commissioner in the previous part of that section. It seems to us, to limit the imprisonment after the final order is refused, or indefinitely postponed, or the interim order is not renewed, to a period of twelve months; that is, to apply to cases in which the defendant is entitled to the benefit of the interim order. Whether, when the defendant in this case has been in prison twelve months, from the 27th of September, 1844, he will be entitled to his discharge under this proviso, is a matter to be hereafter considered, if it should be necessary. We are all clearly of opinion, that he ought not to be discharged, on the present application.

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PARTINGTON.

Writ refused.

TILEY v. HODGSON.

THIS was a rule, calling on the plaintiff to shew cause why the copy of the writ of summons issued in this case should not be set aside for irregularity, on the ground that the form of action was not mentioned therein. The copy of the writ had been served on the 6th of January, and on the evening of the 13th, the plaintiff's attorney was served with notice of the present rule having been granted on that day, and that the rule would be drawn up at the opening

A copy of a writ of summons having been served on the 6th of January, the plaintiff on the 13th received notice of a rule nisi to set aside the copy of the writ for irregularity, and that the rule

would be drawn up at the opening of the office on the following morning. In the afternoon of the 14th, the plaintiff entered an appearance and filed his declaration, and two hours afterwards the rule was served: *Held*, that the defendant was not precluded from objecting to the writ.

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of the office on the following morning. Late in the afternoon of the 14th, the plaintiff entered an appearance for the defendant, filed his declaration, and duly served a notice thereof. Two hours afterwards, a copy of the present rule was served on the plaintiff's attorney.

Montagu Chambers shewed cause. The question is, whether the defendant has applied to the Court within a reasonable time. Although the copy of the writ was served on the 6th, the plaintiff had no notice of the irregularity until the 13th. [*Parke, B.*—If the motion is made before the time for appearance, that is sufficient.] As no rule was served when the office opened, the plaintiff was entitled to enter an appearance and file his declaration. The notice of a rule did not operate as a stay of proceedings. Besides, the defendant, by not returning the notice of declaration, has waived the objection.

Saunders, in support of the rule. The rule could not be served on account of the press of business at the office. *Crow v. Field* (a), is an authority to shew, that an application of this nature may be made at any time before the expiration of the period limited for entering an appearance.

POLLOCK, C. B.—We think the rule ought to be absolute. Where a party receives notice of a rule, and will, notwithstanding, take a step, he must do so at his peril.

Rule absolute.

(a) 8 Dowl. 231.

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DICKINSON v. ALLSOP and Another.

THIS cause, and all matters in difference, and all accounts between the plaintiff and defendants, were referred by Judge's order to arbitration; the costs of the writ and subsequent proceedings to be in the discretion of the arbitrator, all other costs to abide the event of the award. The arbitrator awarded, amongst other things, that a verdict should be entered for the defendants, and that the plaintiff should pay to the defendants the sum of 21*l.* 14*s.* 10*d.* A rule nisi had been granted for an attachment, but on cause being shewn, the Court discharged the rule, on account of a doubt they entertained as to the validity of the award.

Where there is a doubt as to the validity of an award, the Court will not grant a rule under the 1 & 2 Vict. c. 110, s. 18, calling on the party to pay the sum awarded.

Warren now moved for a rule, calling on the plaintiff to shew cause why he should not pay to the defendants the sum of 21*l.* 14*s.* 10*d.*, pursuant to the award. He submitted, that though the Court would not grant an attachment against the person; yet there was no objection to the present application, which merely called on the party to pay the money. The distinction between the two proceedings is adverted to in *Doe v. Amey* (a); and it would seem, from the case of *Jones v. Williams* (b), that a party is entitled to this rule *ex debito justitiæ*.

PARKE, B.—We ought not to grant a rule. The Courts have refused to issue an attachment where there is any doubt as to the validity of the award; not on the ground that an attachment is a proceeding against the person, but because the parties ought to have an opportunity of raising the objections. The present application is the same in substance as that for an attachment (c), for the reasons

(a) 1 Dowl. 23, N. S.; See S. C. 8 M. & W. 565.

(b) 11 A. & E. 175; See S. C. 4 P. & D. 217.

(c) See note (c) to the case of *Hawkins v. Benton and Another*, ante, p. 468.

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stated by Lord *Abinger* in *Doe v. Amey* (a); and we certainly would not grant an attachment in the present case.

ALDERSON, B.—As there is a question of law as to the validity of the award, we ought not to interfere in this summary mode; as there is in effect no difference between the present proceeding and that by attachment: in both cases our judgment is final.

Rule refused.

(a) 1 Dowl. 23, N. S.; See S. C. 8 M. & W. 565.

WADE v. SIMEON.

Where an arrangement is made by consent of the parties to a suit, and in order to carry into effect their intentions, some act remains to be done under the authority of the Court, the Court has power, notwithstanding such previous consent, to see that such act is proper and allowable.

Therefore, where a cause stood for trial on the 7th of December, and on the 6th, the defendant consented to a Judge's order for payment of debt and costs on the 14th;

but before that time he discovered fresh evidence: *Held*, that the Court might 'set aside the order, and let the defendant in to try the cause.

THIS was an action by the holder of two cheques, payable to bearer. The defendant pleaded (amongst other pleas) that the cheques were given to the payee for money lost at play, and that the plaintiff was aware of that fact, at the time he received the cheques. The cause stood for trial on the 7th of December; and on the 6th, the following order was made by *Alderson*, B.

"On hearing the attornies, &c., and by consent, I do order, that on payment of 2000*l.*, and interest on the two cheques, from the date until the payment thereof, (the debt due from the defendant to the plaintiff, for which this action is brought,) together with costs, to be taxed and paid on or before the 14th of December instant, all further proceedings in this cause be stayed; and I further order, that in case default be made in payment, as aforesaid, the plaintiff shall be at liberty to sign final judgment, and issue execution for the whole amount remaining unpaid at the time of such default, with costs of judgment and execution, together with sheriff's poundage, officer's fees, and all other incidental expenses, whether by *fi. fa.* or *ca. sa.*"

After the above order was made, the defendant discovered some additional evidence, which he thought would enable him to prove his plea; and on the 13th of December, he took out a summons to set aside the order. The summons was heard before *Rolfe*, B., who refused to make an order. A similar application having been made to the Court, and a rule nisi obtained;

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W. H. Watson, and *F. V. Lee*, showed cause. First, the Court has no jurisdiction to set aside an order made by consent of the parties. It was suggested, that this case resembled one where additional evidence was discovered after trial; but there is this distinction, that in the latter case the proceedings are adverse, and the Court must necessarily have power to control them. Where a debtor gives a cognovit, or a warrant of attorney, he will not afterwards be allowed to try the merits, because he may have discovered fresh evidence; *Bligh v. Brewer* (a). If it were otherwise, a defendant who had consented to pay the debt and costs, might, perhaps, on taxation, see the briefs of the opposite party, and discovering some weak point in his case, come to the Court for permission to try the cause, and take the chance of a verdict in his favour.

Martin and *Barstow*, in support of the rule. *Bligh v. Brewer* (a) has no application to the present case; for there the party giving the cognovit had the means of shewing that the contract was founded on an illegal consideration, but he abandoned that defence. Besides, here the proceedings are in fieri; but there judgment had been signed, and execution issued. It is almost a matter of course, to grant a new trial, where a verdict has been obtained by surprise, and the unsuccessful party has discovered fresh evidence.

(a) 3 Dowl. 266; See S. C. 1 C., M. & R. 651.

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ALDERSON, B.—Until judgment is actually signed, (the signing it being an act done under the authority of the Court,) it is open for the Court to see that the act about to be done under its authority is not decidedly unjust.

Cur. adv. vult.

POLLOCK, C. B., delivered the judgment of the Court. We entertain no doubt whatever, as to our jurisdiction. Wherever any act remains to be done by the Court, in order to carry out the intentions of the parties, such, for instance, as allowing judgment to be signed, &c., the Court has an equitable jurisdiction, to consider whether the act is proper and allowable, under the circumstances. Then, as to the merits of the case; it is clear, from the affidavits, that there is a point proper to be submitted to a jury, and which ought to be submitted to them. This case is not analogous to *Bligh v. Brewer (a)*, where judgment had been signed on a cognovit, and the Court refused to interfere to set it aside, on the suggestion that it was given for too much, and that the debt was founded on an illegal consideration; but it rather resembles the case of a party who has discovered fresh evidence after a trial. Under all the circumstances, therefore, the present rule should be absolute, on payment of costs by the defendant; and in the event of the ultimate judgment being in favour of the plaintiff, he should have the same benefit from it, so far as all the issues raising the question of gaming are concerned, as if it had been signed on the day on which he was entitled to enter it, according to the terms of the order; the defendant to pay interest at 5*l.* per cent., after the time the money became due. It should also be made a condition, that the trial should proceed, notwithstanding the death of either party.

Rule absolute accordingly.

(a) 3 Dowl. 266; See S. C. 1 C., M. & R. 651.

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GOOLDIFF v. FULLER.

COCKBURN moved for a rule, calling on the plaintiff to shew cause why the defendant should not be at liberty to inspect two letters written by the plaintiff to the defendant, in or about the month of January, 1844. The action was for breach of promise of marriage; and it was alleged, that the proposed marriage was broken off by mutual consent, and under an agreement between the parties, that their respective letters should be given up. The defendant had returned to the plaintiff all letters written by her to him, but the plaintiff had not complied with the agreement by returning the defendant's letters. It was suggested, that the letters in question contained a release of the plaintiff's right of action. *Bousfield v. Godfrey* (a) was cited, as an authority to shew, that under the circumstances the Court would exercise an equitable jurisdiction, and order an inspection.

The Court will not in general grant an inspection of documents, unless they are set out in the declaration, or the one party holds them as trustee or agent for the other.

Therefore, where a contract of marriage had been broken off, and the letters of the plaintiff to the defendant had been returned, the Court refused, in an action for a breach of the contract of marriage, to order an inspection of two letters from the plaintiff which had been returned to her, and which were said to contain a release of the action.

W. H. Watson shewed cause, in the first instance, upon affidavit, that the letters contained no release whatever of the plaintiff's right of action; and contended, that the application was too late; inasmuch as the letters in question were returned in June, 1844, the action commenced in October last, and the cause stood for trial at the sittings in this present Term. He also urged, that this was not a case in which the Court would grant an inspection. (He was then stopped by the Court.)

POLLOCK, C. B.—I think there is no ground for this application. Suppose a bill of exchange is not delivered up on payment by the acceptor, could we make an order for its inspection or delivery? Clearly not. The defendant

(a) 5 Bing. 418; See S. C. 2 M. & P. 771.

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may apply to postpone the trial, unless the plaintiff will consent to produce the letters at the trial.

PARKE, B.—I am of the same opinion. This is not the case of an instrument held by the one party as trustee or agent for the other, in which case it is usual to grant an inspection. (a)

ALDERSON, B.—I concur with the rest of the Court. If we were to grant this application, we should, in effect, be allowing a bill of discovery. The grounds suggested are matter of equity, and the defendant might apply to postpone the trial until he can file a bill in equity. In *Boufield v. Godfrey* (b), the Court granted inspection of a document on which the action was brought; and in such cases, the Courts are in the habit of considering an instrument set out in the declaration, as something in the nature of oyer. There is a case in the books which has given me a great deal of trouble, as it is perpetually cited at Chambers as an authority for applications of this kind. (c) It is to be regretted that that case is not corrected.

Rule refused.

Eventually, the trial was postponed, on payment by the defendant of the costs of the day, and of this application.

(a) See *Jones v. Palmer*, 4 Dowl. 446; *Mayor of Arundel v. Holmes*, 8 Dowl. 118.

(b) 5 Bing. 418.

(c) If his Lordship referred to the case of *Barry v. Alexander*, cited in *Tidd's Pract.* p. 592, 9th ed., and reported in 4 Dougl. 15, where Lord *Mansfield* is said to have held, that whenever the defendant would be entitled to a

discovery, he should have it here, without going into equity; the authority of that case has been much shaken by subsequent decisions; see *Threlfall v. Webster*, 7 Moore, 559; S. C. 1 Bing. 161. *Ratcliffe v. Bleasby*, 3 Bing. 148; S. C. 10 Moore, 523; and *Cocks v. Nash*, 9 Bing. 723; S. C. 3 M. & Scott, 164.



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WATSON and Others, Assignees of FAWCETT v. BOYES and Another.

TROVER by the assignees of a bankrupt. Pleas: first, not guilty. Secondly, a denial of the delivery of the goods by the bankrupt to the defendant. Thirdly, that the bankrupt was not possessed of the goods. Fourthly, that the plaintiffs were not assignees.

At the trial, before *Alderson*, B., at the London sittings after Michaelmas Term, a verdict was found for the defendants on the plea of not guilty, and for the plaintiffs on the other issues. In January, 1844, the defendants signed judgment, and taxed their costs upon the issue found for them, and were paid the amount of the Master's allocatur. In January, 1845, the plaintiffs' attorney applied to the Master to tax the issues found for them, but he refused to do so. An order of *Rolfe*, B., was then obtained, requiring the defendants' attorney, within three days, to enter the proceedings on, and carry in the issue roll, and complete the judgment in the action; and also directing the Master to tax the plaintiffs their costs of and on the several issues found for them.

In trover, the plea of not guilty was found for the defendants, and the other issues for the plaintiffs.

The defendants signed judgment, and taxed their costs, which were paid. The Court refused to set aside an order, which the plaintiffs obtained, nearly a year afterwards, to tax the costs upon the issues found in their favour.

W. H. Watson moved for a rule to rescind that order. The plaintiffs have waived their right to these costs, by not having taxed them at the time of the taxation of the defendants' costs. The rule of Hilary Term, 2 Wm. 4, r. 74, provides, that "no costs shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." The word "deducted," clearly shews that the rule contemplates but one taxation; and it would be contrary to the established practice of the Court to allow two taxations on the same record. [*Parke*, B.—The plaintiffs are entitled to their costs under the 4 Ann. c. 16, s. 5, which expressly allows

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costs to a plaintiff on any issue found for him]. There is no instance of a party being allowed to tax the costs of issues found for him after judgment has been signed on the issues found for the other side, and the costs of those issues paid. [*Parke, B.*—If the plaintiffs' costs exceed those of the defendants, there is no doubt the plaintiffs would be entitled to recover the balance; then how is it to be ascertained unless the costs are taxed?] After the lapse of a year, the plaintiffs have no right to require a taxation.

POLLOCK, C. B.—This is an application to rescind an order, allowing the taxation of the plaintiffs' costs; and we ought not to decide, on motion to rescind that order, that the plaintiffs have no right to recover these costs.

Rule refused.

HOPKINS v. FRANCIS.

Where a defendant pleads nul tiel record, no rule for judgment for the plaintiff is necessary.

Upon issue joined on plea of nul tiel record, the declaration stated generally the recovery of a judgment; but the record produced shewed the judgment to have been signed by reason of default in payment of a debt by in-

THIS was an action on a judgment, to which the defendant pleaded nul tiel record.

Lush moved for judgment, on production of the record.

Pearson, for the defendant, objected that there had been no rule for judgment; *Tidd's Prac.* 744, 9th ed. In 2 *Chitty's Arch. Prac.* 670, 7th ed., it is said, "When the plaintiff replies to a plea of nul tiel record, he must, in the Queen's Bench, give a notice in writing to the defendant's attorney or agent, that he will produce the record on the day therein mentioned. In the Common Pleas and Exchequer, he obtains a rule for judgment, and serves a copy on the defendant's attorney or agent."

stalments as directed by a Judge's order: *Held*, no variance.

Semble, that where the plaintiff declares on a judgment, the Court will, at the instance of the defendant, stay proceedings until the roll is carried in.

POLLOCK, C. B.—That is the case where the defendant produces the record, but the Masters report to us that it is not so when the record is produced by the plaintiff. In *Manning's Exchequer Practice*, ed. 1819, p. 305, it is said, on trial by record, “where a judgment—is pleaded, the plaintiff—may deny the existence of the record.—This issue is triable by the record itself.” The Masters certify that they have a printed form of rule, where the defendant pleads a record; but that there is no such practice, where it is the plaintiff’s record which is denied by the defendant. In *Manning's Practice*, p. 306, it is also said, that “If the plaintiff aver the existence of the record, he gives notice to the defendant that he will produce it on a certain day; but where the record is alleged by the defendant, the plaintiff moves for a four-day rule to produce it.—And a copy is served on the defendant.”

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PARKE, B.—It is strange that the difference in practice was not provided for by the rules of Hilary Term, 2 Wm. 4. But let us be guided by the sense of the thing. What necessity can there be for a rule for judgment? This is a trial by the record, the existence of which is tried by us, and not by a jury. The point has been already virtually decided in *Swinburn v. Taylor* (a).

Pearson. Secondly, there is a variance between the issue and the record. The declaration alleges, that the plaintiff, in her Majesty’s Court of Exchequer, by the consideration and judgment of the said Court, recovered against the defendant the sum of 33*l.* 12*s.* 4*d.* The record produced, alleges that “a certain order was made in the cause, by, &c., one of the Judges of the Court of Common Pleas, by consent, &c., that on payment of 15*l.*, the damage due to the plaintiff, with costs, &c., (by instalments,) before the 17th of August, all further proceedings in the

(a) 1 Dowl. 349, N. S.; See S. C. 9 M. & W. 43.

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said cause should be stayed: and if default should be made in the payment, &c., the plaintiff should be at liberty to sign final judgment, and issue execution, &c." It then alleges, "that although before the 17th of August, the costs of the action were taxed at 18*l.* 12*s.* 4*d.*, and although the 17th of August had elapsed, the defendant did not pay, &c." He cited *Rastall v. Straton* (a), *Munkenbeck v. Bushnell* (b), *Blackmore v. Flemyng* (c), *Phillipson v. Mangles* (d).

PARKE, B.—The cases cited do not apply. It is only necessary to shew a recovery by a judgment; whether that was obtained by default, or in any other way, is quite immaterial.

ALDERSON, B.—The statement, in the record, of the mode in which the judgment was obtained, is no more a part of the judgment, than the speech of a Judge, in which he assigns his reasons for the judgment. Even if there had been a variance, we could have amended it under the 9 Geo. 4, c. 15.

Pearson then objected, that it appeared by affidavit, that the judgment roll was only carried in two or three days ago; so that the plea was true at the time it was pleaded.

POLLOCK, C. B.—If you had moved to stay proceedings, because there was no such roll, perhaps the Court might have done so: but we cannot allow the record to be questioned by affidavit. There must be

Judgment for the Plaintiff.

(a) 1 H. Bl. 49.

(c) 7 T. R. 446.

(b) 4 Dowl. 139; See S. C.

(d) 11 East, 516.

1 Scott, 569.

1845.

DOE dem. BOWMAN and Others v. LEWIS.

THIS was an action of ejectment to recover two estates in the county of Anglesea. The defendant, by the consent rule, defended as tenant of the premises, which he thereby admitted to consist of the said estates. At the trial before *Williams, J.*, the defendant contended that the lessors of the plaintiff had failed to prove their title to one of the estates. On the part of the lessors of the plaintiff it was insisted, that even were that so, they were still entitled, on the authority of *Doe dem. Davenport v. Rhodes* (a), to have a general verdict entered for them, though the execution might be afterwards limited to that part of the premises to which they proved title. The learned Judge was of that opinion, and a general verdict was accordingly taken. A rule nisi for a new trial having been obtained;

A verdict in ejectment may be taken distributively, and the defendant is entitled to have it entered for him for that part of the premises to which the lessor of the plaintiff has failed to prove title.

Welsby and *Townsend* shewed cause. (b) There are several authorities to shew, that a defendant in ejectment has no right to have the verdict entered distributively; though the plaintiff has failed to prove title to part of the premises. In *Doe dem. Bishton v. Hughes* (c), twelve defendants entered into a general joint consent rule, not specifying the premises for which they severally defended; at the assizes, the Judge made an order that the record should be amended, by allowing two of the defendants to withdraw their plea, and suffer judgment by default; but no express order was made as to any amendment of the consent rule. The trial proceeded,—these two defendants did not appear, but the other ten made out a complete defence. The Court held, that the order did not operate as an amendment of the consent rule, and that the plaintiff

(a) 11 M. & W. 600; See S. C. ante, vol. 1, p. 292.

(b) After argument, the Court decided that the lessors of the plaintiff had, in point of fact, failed to prove their title to one of the estates. The question then

became, whether, notwithstanding that they had failed as to part, the verdict was not properly entered generally for the lessors of the plaintiff.

(c) 2 C., M. & R. 281; See S. C. 4 Dowl. 412.

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was, notwithstanding the order, entitled to a verdict against all the defendants; though the Court directed, that the ten defendants who went to trial should be allowed the costs of their defence on taxation. So in *Roe dem. Blair v. Street (a)*, where two persons pleaded severally, and entered into separate consent rules for different portions of the premises, and the lessor of the plaintiff succeeded against one only; the Judge who tried the cause, and also the Court, refused to amend the *postea*, by confining the verdict to the premises to which title had been proved. *Doe dem. Davenport v. Rhodes (b)*, expressly decided, that where a defendant in ejectment, has entered into the ordinary general consent rule, the verdict is general; and the defendant is not entitled to have it entered for him as to any part of the premises to which the lessor of the plaintiff fails to prove a title. There Lord Abinger, C. B., says, "It has been an established rule in actions of ejectment, ever since I have known the law, that when the plaintiff recovers a verdict, although he proves a title to a part only, he may take his verdict generally, unless it is otherwise consented to or arranged at the trial; but it is at his peril, what he takes possession of under the execution." *Doe v. Errington (c)*, is there stated by Lord Abinger, to be distinguishable, on the ground, "that for aught that appears to the contrary, it might have been arranged at the time of the trial, that the plaintiff should have a verdict for the copyhold, and the defendant for the freehold." And Rolfe, B., says, "Our decision does not exclude the defendants from the taxation of their costs; if they make out that they are entitled to costs in any way, that is still open to them."

Jervis, contra. The verdict ought to be entered distributively. The defendant, in accordance with the rule of E. T., 2 Geo. 4, has specified in the consent rule, the particular premises for which he defends; and on principle,

(a) 2 A. & E. 329; See S. C. *ante*, vol. 1, p. 292.

4 N. & M. 42.

(c) 4 Dowl. 602.

(b) 11 M. & W. 600; See S. C.

there is no reason why he should not have a verdict for the part on which he succeeds. The plea of not guilty is equally as distributable in ejectment, as in trespass or trover. This case is not distinguishable from that of an action of trespass for breaking and entering two closes, and a title proved by the defendant to one of them. *Doe v. Errington* (a), is a distinct authority in favour of the defendant. It is not correct to say, that the defendant may have his costs, for the Master can only tax according to the *postea*. *Doe dem. Bishton v. Hughes* (b) is in favour of the defendant; for the Court there made an order that the defendants who went to trial should have costs. In *Doe dem. Davenport v. Rhodes* (c), the Court intimated that the defendant might be entitled to costs, if the consent rule specified the particular parts of the premises for which he defended.

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Cur. adv. vult.

The judgment of the Court was delivered by

PARKE, B.—The question in this case was, whether the defendant was entitled to the verdict as to part of the land for which this ejectment was brought. The lessors of the plaintiff sought to recover under a mortgage title, and by a general description, one estate called Tros-y-Marian, and another called Pen-y-Marian. The defendant entered into a special consent rule, defending for those estates by name. At the trial, the lessors of the plaintiff succeeded, but my Brother *Williams* doubted as to their right to recover the latter estate, and offered to reserve the point; the plaintiff's counsel, however, refused, and the verdict was accordingly entered for the lessors of the plaintiff. A motion for a new trial was afterwards made, and a rule nisi granted.

On the argument on shewing cause, the Court was of opinion, that the lessors of the plaintiff were not entitled to succeed as to one of the estates, viz., Pen-y-Marian. Mr. *Welsby*, on their behalf, then insisted, that they were

(a) 4 Dowl. 602.

(c) 11 M. & W. 600; See S. C.

(b) 2 C., M. & R. 281; See *ante*, vol. 1, p. 292.

S. C. 4 Dowl. 412.

1841.

See also
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and others
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entitled to keep the verdict entered for them, though they failed as to part: and were merely bound at their peril to limit the execution to the part to which they were entitled. Mr. Jones contended, that the defendant had a right to a verdict as to the part to which he had succeeded, and upon which he might have costs taxed.

In older times, it seems that the verdict was possible in ejectment: for in a case in *Scroth*, 2. 28, *Mansel, C. R.*, by way of illustration, puts the case of an ejectment for twenty acres, in which there is a verdict for the plaintiff for ten, and for the defendant for the residue. So it was held in *Guy v. Road* &c. But in modern times, before the New Rules, not the pleading rules, but those of Hilary Term, 2 Wm. 4, the practice undoubtedly was, for the loser of the plaintiff, if he succeeded in making out his title to any part of the property, to take a general verdict, and under a *facere facias possessionem*, to take the part only to which he was entitled: for it was immaterial to the defendant, whether he had a verdict for a part or not, as he could not obtain any costs if he had: and the same practice as to the costs prevailed in all the forms of action, the construction then put upon the statutes 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3, which give the defendant costs, if any verdict is found for him, being, that a defendant, in order to obtain costs, must have a verdict as to all the causes of action which were the subject of a trial at *Nisi Prius*. If, for example, he pleaded as to part, on which issue was joined, and suffered judgment by default for the remainder, and the issue was found for him, he had his costs: (see the cases cited and collected in *Tidd's Pract.* pp. 971, 972, 973, 9th ed.) But whether there was judgment by default as to part, or not, if the plaintiff succeeded as to any part on the trial, and the defendant on the remainder, the plaintiff was entitled to the general costs, the defendant to none.

The New Rule, Hilary Term, 2 Wm. 4, r. 74, places the right to costs on a different footing; the Judges who framed it being, as I know, of opinion, that the decisions

had put a wrong construction on the statute above mentioned. Since then, the defendant who has obtained a verdict upon an issue, has been entitled to his costs. In applying that rule, the plea of not guilty has been held to raise a separate issue on each count of the declaration to which it is pleaded, *Cox v. Thomason* (a); and on each part of a divisible count in an action on the case, *Prudhomme v. Fraser* (b). So in *Knight v. Brown* (c), a plea of non assumpsit to several counts, was held to raise an issue on each. Precisely the same reason applied to an action of ejectment; and if the defendant succeeds as to a part, and it is material to him ~~to~~ a view to costs, to have a verdict found for him as to that part, he has a right to have it so found, and have his costs taxed upon that verdict. This was done in the case of *Doe v. Errington* (d), before my Brother Coleridge, who held, that the defendant was entitled to a verdict in accordance with these decisions, and with the rule of Court, which, he rightly observed, is founded on strict justice.

The rule was also applied to an ejectment by the King's Bench, in *Doe v. Webber* (e), where the plaintiff had a verdict on one demise, and the defendant on the other; and this course has been frequently adopted.

This Court, however, in the recent case of *Doe dem. Davenport v. Rhodes* (f), came to a different conclusion where the plaintiff recovered part, and failed as to part of the land in dispute. Lord Abinger and my Brother Gurney appeared to have proceeded on the old practice, not advertent to the alteration made by the rule of Hilary Term, 2 Wm. 4, and also upon the case of *Roe dem. Blair v. Street* (g), the decision in which, however, seems to have been come to on the ground that the lessor of the plaintiff

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(a) 2 Cr. & J. 498; See S. C. 1 Dowl. 572.

(b) 2 A. & E. 645; See S. C. 4 N. & M. 512.

(c) 9 Bing. 643; See S. C. 2 M. & Scott. 797; 1 Dowl. 730.

(d) 4 Dowl. 602.

(e) 2 A. & E. 448; See S. C. 4 N. & M. 381.

(f) 11 M. & W. 600; See S. C. *ante*, vol. 1, p. 292.

(g) 2 A. & E. 329; See S. C. 4 N. & M. 42.

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was entitled to recover the whole, as he certainly was; though some of the Court spoke of the old practice as continuing, and that he might recover if he succeeded as to any part.

We think, upon consideration, that the present case falls within the words and principle of the New Rule, and accords with the previous decisions upon it; and therefore, are of opinion that the rule must be absolute for a new trial; unless the lessors of the plaintiff will consent that the verdict be entered for the defendant for the part on which the plaintiff failed.

Rule accordingly.

NORDENSTROM v. PITT.

Where a writ of error was sued out on a declaration containing a count for interest in the usual form; and the error assigned was that no implied promise to pay interest arose from the facts alleged; the Court held the ground of error frivolous, and allowed execution to issue.

THE declaration in this case contained a count for interest in the usual form. The plaintiff having obtained judgment, a writ of error was sued out, and the ground of error was, that the count was founded upon a promise supposed to be implied by law; whereas no such promise could be implied: and that no sufficient consideration appeared to sustain an express promise. A rule had been obtained, calling on the defendant to shew cause why execution should not issue notwithstanding the writ of error; the grounds of error assigned being frivolous.

C. Edwards shewed cause. The count is bad; as the mere forbearance of money does not necessarily raise any implied promise to pay interest, and no express contract for that purpose is alleged.

Jervis and *Butt* were not called on to support the rule.

PARKE, B.—The rule must be absolute, for the grounds of error assigned are clearly frivolous. If the defendants can succeed in convincing the Court of error that they are right, the judgment will be reversed, and they will recover all they may have lost by the execution.

Rule absolute.

1845.

DOE dem. ROBERTS and Others v. ROE.

IN this case a rule had been obtained for judgment against the casual ejector. On the day on which the time limited for entering an appearance expired, one Royle, who claimed to defend as landlord, took out a summons for particulars of the premises sought to be recovered, and also a summons for time to appear and plead. Upon the first summons an order was made for the delivery of particulars, but the order contained no clause directing a stay of proceedings in the mean time. Upon the second summons an order was made for Royle to have a week's time to plead, and that he be at liberty to appear and defend as landlord for a portion of the premises. On the 24th of December, (the time for pleading having then expired), the lessors of the plaintiff signed judgment against the casual ejector; and, on the 30th, a writ of possession was executed. A summons was taken out to set aside the judgment and execution for irregularity; on the ground that the order for particulars operated as a stay of proceedings, although it contained no clause to that effect. This summons was returnable on the 7th of January, but was adjourned at the request of the attorney of the lessors of the plaintiff until the 14th. On that day, the clerk of the attorney of the lessors of the plaintiff attended and requested a further adjournment, in order that counsel might be heard. The learned Judge refused to adjourn the summons beyond the following day; stating, that by a rule of the Judges, counsel could not be heard at Chambers during Term; and he required the clerk to go on with the case, either then or on the following day. The clerk having declined, the learned Judge set aside the judgment, with costs.

In ejectment, a party claiming to be landlord took out a summons for particulars of the premises, and also a summons for time to appear and plead. An order was made for the delivery of particulars, but containing no clause for a stay of proceedings: on the other summons an order was made for a week's time to plead: *Held*, that the order for particulars did not operate as a stay of proceedings.

The rule as to not bearing counsel at Chambers in Term time, does not apply to summonses originally returnable in Vacation.

Welsby had obtained a rule, calling on Royle to shew cause why this order should not be rescinded; unless he would consent to the judgment being set aside, on payment of costs by him.

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Martin shewed cause. In all the books of practice it is laid down, that a summons for particulars is of itself a stay of proceedings; although it contains no clause to that effect. That such is the correct practice appears from the rule of Hilary Term, 2 Wm. 4, r. 48, which provides, that "a defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order, which he had at the return of the summons." In *Jervis's New Rules*, p. 72, n. (a), 4th ed. it is said, "If an order for particulars be made, it stays proceedings, and the defendant cannot, until that order be rescinded, sign judgment of non pros." [*Parke*, B.—That means if the order is made according to the printed form, which contains a clause for staying the proceedings. *Alderson*, B.—I am constantly in the habit of making orders for the delivery of particulars without a stay of proceedings.] In *Tidd's Pract.* p. 597, 9th ed. it is said, that such an order operates, "when drawn up and served, as a stay of proceedings, till the particulars are delivered." Also in *Bagley's Pract.* p. 115, it is said, that "an order for particulars, unless it be expressly framed to prevent this result, operates as a stay of proceedings from the time the order is served until the particulars are delivered under it." Again, in *Lush's Pract.* p. 382, it is laid down, that a summons for particulars "as usually drawn up, operates as a stay of proceedings from the time of its return." [*Parke*, B.—What is there said is perfectly correct with reference to the usual form. The Masters certify that there is no doubt as to the practice.] At all events, the defendant is entitled to the costs of appearing on this application.

Jervis (*Welsby* with him) in support of the rule. An order for particulars is no stay of proceedings, unless it contain a clause to that effect. Then the judgment being regular, it can only be set aside on payment of costs. In neither view of the case, can the nominal defendant have costs; *Doe dem. Vernon v. Roe* (a), *Goodright dem. Ward*

(a) 7 A. & E. 14; See S. C. 2 N. & P. 237.

v. Badtittle (a). The learned Judge was wrong in refusing to hear counsel, as the summons was in fact returnable in Vacation, and stood over until the Term by consent. [*Alderson, B.*—The rule as to not hearing counsel at Chambers does not apply to a case like this, but only to summonses originally returnable in Term. The reason is, that if the case require the assistance of counsel, the application should be made in Court.]

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POLLOCK, C. B.—The rule must be absolute without costs, for rescinding the Judge's order; and the judgment may be set aside on payment of costs by the defendant.

PARKE, B., and ALDERSON, B., concurred.

Rule accordingly.

(a) 2 W. Bl. 763.

FAIRTHORNE *v.* DONALD.

ASSUMPSIT for work and labour by the plaintiff as an attorney and solicitor, for money paid, and on an account stated.

Pleas. First, non assumpsit. Secondly, a set-off for 400*l.* for work and labour of the defendant, and materials provided by him, as a schoolmaster, in the instruction of divers infants for the plaintiff, at his request; and upon an account stated: "which said sum of money so due to the defendant, was to be paid by the plaintiff to the defendant on request, and exceeds the damage sustained by the plaintiff by reason of the non performance by the defendant of the said several promises in the declaration mentioned." Thirdly, as to 32*l.* 3*s.* 6*d.* parcel, &c.; the Statute of Limitations.

To a plea of set-off for 400*l.*, alleging in the usual form that such sum exceeded the damages sustained by the plaintiff; the latter replied, as to 234*l.* parcel, &c., the Statute of Limitations, and as to the residue of the 400*l.* that he was not indebted, modo et formâ, concluding with a prayer of judgment:

Semble, that the replication was bad: also, that, in strictness, a plea of set-off should allege that the defendant's claim equals, not exceeds, that of the plaintiff.

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The plaintiff joined issue on the first plea, traversed the third, and to the second replied, that the said causes of set-off in that plea mentioned, so far as the same relate to 234*l.* 5*s.* 3*d.*, parcel of the said sum of 400*l.* in the said second plea mentioned, did not, nor did any of them, accrue to the defendant at any time within six years before the commencement of this suit; and that he the plaintiff was not, nor is, indebted to the defendant in the residue of the said sum of 400*l.* or any part thereof, in manner and form, &c.; wherefore the plaintiff prays judgment.

Special demurrer to the replication to a part of the second plea, on the ground that it ought to have concluded with a prayer of judgment, or with a verification, or to the country; whereas the said replication has no conclusion whatever either to the country, or with a prayer of judgment, or with a verification; and has no proper conclusion.

Special demurrer also to the replication to the residue of the second plea, on the ground that it is a traverse or denial of the matter alleged in the plea, and according to the rules of good pleading, ought to have concluded to the country, and not with a prayer of judgment.

Joinder in demurrer.

Cowling, in support of the demurrers. The replication sets up two distinct answers to the plea. As to the first, it is bad for want of a conclusion; for though it was decided in the case of *Bodenham v. Hill* (a), that a plea of the Statute of Limitations need not be verified, yet it ought to have some conclusion. The second branch of the replication denies a portion of the set-off, and as it is a simple traverse of a fact alleged, it ought to have concluded to the country. [*Parke*, B.—Is it not one entire answer to the plea? The plaintiff says, I never was indebted except in a certain amount, and that is barred by the Statute of Limitations.] In that view, the replication is bad in substance; for the

(a) 8 Dowl. 862; S. C. 7 M. & W. 274.

plea alleges that the debt due from the plaintiff to the defendant exceeds the amount due from the defendant to the plaintiff: the replication does not deny that fact. [The Court called on]

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Lush, to support the replication. The difficulty has arisen from the form of the plea. [*Parke*, B.—It is the form in use ever since I have known the profession.] It is submitted that it is bad in stating that the defendant's claim exceeds the plaintiff's debt. The real question on a plea of set-off is, whether the plaintiff owes the defendant a sum equal in amount to the plaintiff's claim; but this plea raises an issue upon the excess; the plaintiff has, therefore, to answer an excess which is not defined. [*Parke*, B.—Under the ordinary replication, the issue is whether the plaintiff is indebted in an equal or greater amount.] The statutes of set-off only contemplate the case of a defendant having a demand equal to that of the plaintiff. If this plea had alleged that the sum due to the defendant equalled the damages sustained by the plaintiff, then if any amount, however small, was barred by the Statute of Limitations, the plaintiff would recover; but this plea compels the plaintiff to answer an excess.

PARKE, B.—There seems to me to be no difficulty in framing a proper replication. The plea is perhaps informal, but it is sanctioned by usage. Why would it not be sufficient to reply generally the Statute of Limitations? On that issue the defendant must shew a debt due within six years equal to or greater than that which the plaintiff claims. The better course will be for both parties to amend, without costs on either side.

Amendment accordingly.



1845.

DOE dem. DUDGEON and Another v. MARTIN, CHAPMAN,
and Others.

The Court cannot on motion grant a new trial as to one defendant, where a verdict has been found against him, and for the other defendants.

THIS was an ejectment for certain freehold lands in the county of Norfolk. In the year 1837, Dudgeon, one of the lessors of the plaintiff, had purchased of the owner of the estates an annuity of 380*L*, secured by a warrant of attorney, upon which judgment was entered up. The annuity having become in arrear, Dudgeon, in the year 1822, sued out an elegit, and proceeded thereon by ejectment; but afterwards abandoned the proceedings, on discovering that there were two outstanding terms of five hundred and one thousand years in the estate in question. Dudgeon subsequently assigned the annuity to one Smith, and they both filed a bill against certain parties holding incumbrances on the estate, and praying for a declaration that Smith was entitled as first incumbrancer. In 1844, the cause came on for hearing before the Master of the Rolls, when his Honor ordered that the plaintiffs' bill be retained twelve months, with liberty for the plaintiffs to proceed at law, and that the defendants be restrained by injunction from setting up against the plaintiffs' action the unsatisfied terms of five hundred and one thousand years, or from pleading the Statute of Limitations in bar of such action. The ejectment came on for trial before *Alderson*, B., at the Norfolk Summer Assizes, 1844, when all the defendants, except Chapman, notwithstanding the order of the Master of the Rolls, set up the Statute of Limitations as a defence, and thereby obtained a verdict. The counsel for Chapman at first stated that he did not mean to avail himself of the outstanding terms, or of the Statute of Limitations; but he subsequently said, that he neither relied upon them, or waived them. The jury having found a verdict against Chapman;

O'Malley obtained a rule to shew cause "why the verdict found for the lessors of the plaintiff against the defendant

Chapman should not be set aside, and a new trial had," on the ground that the learned Judge should have directed the jury to find a verdict for Chapman.

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Byles, Serjt., and *Willes*, shewed cause. First, the counsel for Chapman expressly stated that he should not take advantage of the outstanding terms, or of the Statute of Limitations; he is, therefore, not entitled to move for a new trial on the ground of misdirection. Secondly, the Court has no power to grant a new trial as to one defendant, where the other defendants have obtained a verdict. [*O'Malley* intimated that the other defendants were willing to consent to a new trial.] The present rule calls on the lessors of the plaintiff to shew cause why the verdict against Chapman should not be set aside; and though the other defendants should consent, the Court cannot set aside the verdict as to all, without the consent of the lessors of the plaintiff. If Chapman was desirous of vacating the verdict against himself, he should have tendered a bill of exceptions to the directions of the learned Judge. [*Parke*, B.—In that case there might possibly be a new trial in respect of one defendant; because the reason for it would then appear upon the record, which is not the case when a new trial is granted on motion. In *Price v. Harris* (a), the Court of Common Pleas granted a new trial as to five out of fifteen defendants. My Brother *Alderson*, however, is enabled to state from his recollection, that that was done by consent. There is also a case of *Snelgrove v. Smart and Others* (b), where a new trial was granted as to one defendant; but in that case also it was by consent. Undoubtedly the old authorities are against such a course.]

The Court called on

O'Malley to support the rule. As the other defendants are willing to consent to a new trial, there can be no

(a) 10 Bing. 331; See S. C. 3 M. & Scott, 833.

(b) Reported on another point, 12 M. & W. 135.

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injustice in granting it in favour of the one defendant. [Parke, B.—I think we have no power to do that. The rule might have been for a new trial against all the defendants, with the consent of those who obtained a verdict.] Where one of several defendants asks to set aside a verdict against him, he in effect asks to set it aside as against his co-defendants.

PARKE, B.—This rule only asks for a new trial as to one defendant, and that we have no power to grant. The rule must be discharged.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule discharged.

WILLIAMS v. JONES.

Debt will lie upon the judgment of an inferior Court, though not of record.

The plaintiff declared on a judgment obtained in a county Court against the defendant: *Held*, on special demurrer, that it was not necessary to state in the declaration that the defendant resided within the jurisdiction of the county Court, or that he was duly summoned.

DEBT. The declaration stated, that whereas the plaintiff, on, &c., at a county Court of the sheriff of the county of Carnarvon, to wit, John Price, Esq., then sheriff of the said county, held at the county Hall in Carnarvon, in and for the said county, and within the jurisdiction of the said Court, before D. and E. &c., the free suitors of the said Court, came according to the custom of the said Court, by W. his attorney, and then and there, according to the custom of the said Court, levied his plaint against the defendant in a plea of debt of 1*l.* 19*s.* 11*d.* for a certain cause of action arising to the plaintiff within the jurisdiction of the said Court, and such proceedings were thereupon had, that he, the said plaintiff, afterwards, to wit, on, &c., at the county Court, to wit, the sixth Court of the said sheriff, held in and for, and within the jurisdiction of the said Court, before, &c., the free suitors of the said Court, by the consideration and judgment of the said Court, recovered against the said defendant 1*l.* for his said debt, and also

10*l.* 4*s.* 4*d.*, which in and by the said Court, before the said last mentioned suitors, were then adjudged to the plaintiff, and with his assent, for his damages, &c.

Special demurrer, assigning amongst other causes, that in law no action lay upon the judgment of an inferior Court not of record: and that it was not stated in or by the declaration, that the defendant was a resident within the county, or within the jurisdiction of the said Court, or that he had been duly summoned.

Pearson, in support of the demurrer. An action of debt will not lie on the judgment of an inferior Court not of record. The total absence of any instance of such an action is a strong argument in favour of the position contended for; and without some authority, the Court will not be disposed to extend the proceedings on judgments by action; which has always been considered a vexatious and oppressive course; 3 *Bl. Com.* 160. The judgment of an inferior Court not of record has no greater force than a rule of Court, upon which, it has been decided, that no action will lie; *Emerson v. Lashley* (a). It is true that in *Henley v. Soper* (b) it was held that debt will lie on the decree of a colonial Court; but that decision proceeded on the express ground that, as a colonial Court cannot enforce its decrees here, there would otherwise be a failure of justice. In *Harris v. Saunders* (c), *Abbott*, C. J., carefully abstains from saying that debt will lie on an Irish judgment. It seems that no action can be maintained on an order for payment of costs; *Fry v. Malcolm* (d). Nor is an action maintainable on a decree of a Court of equity; *Carpenter v. Thornton* (e). All the instances in which debt will lie upon a judgment are enumerated in *Comyn's Digest*, tit. "Debt," (A 2), and no mention is made of the judgment of an inferior Court

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(a) 2 H. Bl. 248.

D. & R. 471.

(b) 8 B. & C. 20; See S. C. 2

(d) 4 Taunt. 705.

M. & R. 16.

(e) 3 B. & A. 52.

(c) 4 B. & C. 411; See S. C. 6

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not of record. [*Parke*, B.—The judgment of an inferior Court not of record can only be enforced by writ of fieri facias or distringas; there is no obligation on the person or estate; perhaps the reason why an action may not lie upon such judgments may be because it would alter the nature of the obligation. There can be no doubt that if *assumpsit* will lie, debt will lie.] Secondly, the declaration is defective, inasmuch as it does not shew what authority the sheriff had to try this case, as it is not averred that the defendant was resident within the jurisdiction of the Court. In setting out the proceedings of an inferior Court, sufficient must appear to shew that the Court has jurisdiction; *Sollers v. Lawrence* (a); *Com. Dig.* tit. “County” (C 8); *M^cCollam v. Carr* (b). In this case it was necessary also that the defendant should be resident within the county; *Welsh v. Troyte* (c). It is clear from the case of *Coore v. Keneday* (d), that the fact of the defendant’s residence within the jurisdiction is a material traversable allegation. [*Pollock*, C. B.—*Pritchard v. M^cGill* (e) determined that it is not necessary, in order to give a county Court jurisdiction, that the plaintiff should reside within the county.] *Read v. Pope* (f) expressly decided, that in debt on a judgment in an inferior Court, the declaration must allege that the cause of action in the original suit arose within the jurisdiction of the inferior Court. *Briscoe v. Stephens* (g) shews that a party residing out of the jurisdiction of an inferior Court is not liable to be sued therein. In *Rider v. Edwards* (h), *Tindal*, C. J., says, “We are not bound to take notice of the practice of the county Court, and the plea does not disclose it.” *Moravia v. Sloper* (i), is also an authority in support of the position contended for.

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| (a) Willes, 413. | (f) 1 C., M. & R. 302. |
| (b) 1 B. & P. 223. | (g) 2 Bing. 213; See S. C. 9 |
| (c) 2 H. Bl. 29. | Moore, 413. |
| (d) 3 Esp. 280. | (h) 3 M. & G. 208; See S. C. |
| (e) 2 M. & W. 380; See S. C. | 3 Scott, N. R. 456. |
| 5 Dowl. 731. | (i) Willes, 30. |

Welsby, contra. Debt will lie upon every contract in fact or in law. It is true that there is an absence of authority for that position; but there are several instances of actions on judgments of county Courts, in which no objection was taken to the form of action; *Herbert v. Cook*, cited in a note to *Moravia v. Sloper* (a), *Read v. Pope* (b). It would seem that debt will lie upon an inquisition; *Corrigal v. The London and Blackwall Railway Company* (c). It is no objection to an action like the present that the judgment of an inferior Court not of record can only be enforced by fieri facias or distringas; because the very object of proceeding in the superior Court is to enlarge the remedy. Secondly, the declaration is sufficient. All the precedents shew that it is only necessary to state that the cause of action arose within the jurisdiction of the county Court. The cases on this subject are collected in the note to *Pitt v. Knight* (d). In *Rowland v. Veale* (e), the plea stated that the plaintiff below levied his plaint in a plea of trespass on the case, for a cause of action arising within the jurisdiction of the Court. This plea was demurred to and held good. That case was recognised by *Buller, J.*, in *Belk v. Broadbent* (f). *Moravia v. Sloper* (g) is distinguishable, for there the Court was held by letters patent, and had no jurisdiction at common law; therefore it was necessary to shew what jurisdiction the Court had. *Herbert v. Cook* was a demurrer to a plea which expressly traversed the allegation that the cause of action arose within the jurisdiction of the hundred Court. In *Read v. Pope* the declaration did not state that the defendant resided within the jurisdiction of the county Court. In *Coore v. Keneday* (h), the question arose upon a judgment of the Court of Conscience for the city of London, and the acts of Parliament which establish that Court, (3 Jac. 1, c. 15, and 14 Geo. 2, c. 10), limit its jurisdiction

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(a) Willes, 36, n. (a).

(b) 1 C., M. & R. 302.

(c) 5 M. & G. 219; See S. C.
 6 Scott, N. R. 241 2 Dowl. 851,
 N. S.

(d) 1 Wms. Saund. 91, a.

(e) Cowp. 18.

(f) 3 T. R. 185.

(g) Willes, 30.

(h) 3 Esp. 280.

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to persons residing within the city or liberties thereof. *Briscoe v. Stephens* (a) is distinguishable: that was a declaration in assumpsit, to which the defendant pleaded that the plaintiff had sued him for the same cause of action in an inferior Court, without stating that the consideration arose within its jurisdiction. It is sufficient to shew on the face of the declaration that the inferior Court had jurisdiction over the subject matter, and if the defendant was not served with process, or was not within the jurisdiction of the Court, that should come by way of plea.

Pearson was heard in reply.

POLLOCK, C. B.—There must be judgment for the plaintiff. The question raised by the demurrer is twofold; first, whether an action of debt will lie upon the judgment of an inferior Court not of record; and, secondly, whether enough is stated in the declaration to shew that the Court had jurisdiction in this case. As to the first point, the counsel who argued in support of the demurrer appeared to think it possible that assumpsit would lie upon the judgment of an inferior Court not of record; and I am of opinion that if assumpsit would lie, debt also will lie. There are certainly instances of debt having been brought on such a judgment. *Coore v. Keneday* (b) is one, and *Herbert v. Cook* (c) is another; and in those cases the objection would probably have been taken, if it were well founded. Upon principle there seems to be no reason why debt should not lie upon the judgment of a Court of competent jurisdiction, whether of record or not of record; for as soon as the Court has determined that one party is indebted to the other, that creates a debt; and it appears reasonable, and there is no authority against it, that the debt should be enforced by the superior Court. With respect to the second objection, namely, that it does not

(a) 2 Bing. 213.

(b) 3 Esp. 280.

(c) Willes, 36, n. (a).

appear on the face of the declaration that the defendant was resident within the jurisdiction of the county Court, or that he was summoned; I am of opinion that neither of these allegations are necessary. If, in point of fact, the defendant never was summoned, or never resided within the jurisdiction of the Court, that is matter of defence.

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PARKE, B.—I am of the same opinion. The principle on which an action of debt lies upon a judgment is this; that when a Court of competent jurisdiction has adjudicated and determined that a sum of money is due, there is by law an obligation to pay that sum. If, then, an action of debt may be brought, where the record is of a higher nature; that action may also be brought upon the judgment of an inferior Court. Assumpsit lies if there is no obligation of record created between the parties. That is the principle upon which actions on judgments of foreign Courts are supported. There is an obligation to obey the judgment, which is enforced in this country. It is the same with respect to an action on the judgment of an inferior Court. Several precedents were cited, in which the present objection was not taken; and although that is not a very strong argument to shew that debt will lie, yet it is undoubtedly entitled to some weight. I therefore entertain no doubt that an action of debt will lie. In the course of the argument I threw out an observation that, possibly, no such obligation would be created as to found an action of debt, because an inferior Court not of record cannot issue execution against the person or estate of the debtor; but upon consideration it appears to me, that an action of debt does not alter the nature of the obligation, but is only the mode by which it is to be enforced. There is no doubt that debt will lie on a judgment of the Court of the duchy of Lancaster, or of the county palatine of Durham; though such Courts are limited in their jurisdiction. As it appears then that debt will lie, the next question is, whether the declaration is defective in the manner in which the judgment is set out.

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As to that, it seems to me that the only point is, whether it is necessary to state anything more than that the cause of action arose within the jurisdiction of the Court. The precedents state no more, and I cannot see that it is necessary to state more. No doubt, in order to enable this Court to stay proceedings, on the ground that the action ought to have been brought in the county Court, it is necessary to shew that the cause of action arose within the limits of the county Court—that the defendant is amenable to the Court by residing there; otherwise we might altogether deprive a plaintiff of his remedy. So also in proceedings under the Middlesex county Court; for there the act of Parliament only renders those persons liable to be summoned, who are living within the jurisdiction of the Court. But, suppose a person sued who is a mere temporary resident, and upon being served with process he appears and defends, and the Court gives judgment against him; in an action upon that judgment, it would not be necessary to state more than that the cause of action arose within the jurisdiction of the Court. With reference to what is said in argument in the case of *Welsh v. Troyte (a)*, on referring to the authority there cited from 2 *Inst.* 229, 230, I find it by no means bears out the position contended for.

ALDERSON, B.—I am of the same opinion. The principle which governs the action of debt upon the judgment of an inferior Court of record, appears to me to extend to the judgment of an inferior Court not of record. If it is answered that the one is more extensive in its operation than the other, that argument would apply to both descriptions of judgments; for the judgment of a superior Court is still more extensive than either. It appears to me that there is no difference whatever in principle. If a Court of competent jurisdiction decide between A. and B., that B. owes a sum of money to A.; there then arises an obligation

(a) 2 H. Bl. 29.

to pay that sum of money, to enforce which the party may bring an action of debt. It is upon that principle that actions on foreign judgments are supported. The only remaining question is, whether the record states enough to shew that the county Court had jurisdiction. Where it is alleged that the cause of action arose within the county Court, this Court will take notice of its jurisdiction. It will not notice a Court of record held by charter or custom, but it will take notice of a county Court. If the defendant was not in fact resident, it is for him to shew that by plea. So if an action were brought on the judgment of a foreign Court, it would be competent for the defendant to plead that he was not liable to the jurisdiction of the Court. In this case, it appears to me, that the declaration is sufficient.

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Judgment for the Plaintiff.

ROBERTSON v. SHOWLER.

DETINUE for title deeds, &c. Plea, that the said deeds, &c. were, at the time of the making of the will of Sarah Knight, the title deeds relating to certain messuages, situate, &c.: that before the plaintiff had any title in the deeds, &c., and before the detention, Sarah Knight was seised in fee of the said messuages, and possessed as of her own property of the said deeds: that Sarah Knight, on, &c. made her will. (The plea then set out the will in hæc verba; by which, amongst other property, the testatrix devised three messuages to certain parties for their lives, and after their death, to one Susan Denne and her sister for life.) The plea then averred, that by certain words in her will, the testatrix meant to devise certain houses, situate, &c.; and that she was not seised of any messuages which could by any possibility be meant by the words of the will, except the said three messuages of which she was

To detinue for title deeds, the defendant pleaded a devise of certain messuages to which the deeds related; and set out the will in hæc verba. On the face of it, it appeared doubtful whether the messuages in question were those which the testatrix meant to devise: *Held*, on special demurrer, that the plea was bad, for not setting out the will according to its legal effect.

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so seised as aforesaid. The plea then averred the death of Sarah Knight, and of certain of the devisees for life under her will; whereby the said Susan Denne was seised in her demesne as of freehold for life, of an undivided moiety of the said three messuages, and possessed for her life of an undivided moiety of and in the said deeds, &c. as such title deeds, in right of her said estate: that Susan Denne, by an agreement in writing signed by her, agreed with the defendant to sell and convey to the defendant all her interest in the said messuages, for the sum of 1080*l*.; that before the agreement the defendant was holding the said deeds, &c. in his care and custody, as agent for Susan Denne; and that upon the making of the said agreement, she left the said deeds in the defendant's possession, that he might hold and detain the same until she should perform the agreement; that the defendant was, and still is, ready to purchase and accept a conveyance of all the said estate, and to pay the purchase money, whereof Susan Denne had notice; that afterwards, and whilst the defendant was keeping and detaining the said deeds, under and in pursuance of the terms on which they were so left with him, the said Susan Denne, against the will of the defendant, conveyed all her estate and interest in the said messuages, deeds, &c. to the plaintiff; wherefore the said defendant detained the deeds, &c.

Special demurrer, assigning for causes, amongst others, that the defendant had set out at length the will of Sarah Knight, instead of stating the legal effect of it; thereby setting out evidence of facts, instead of alleging the facts themselves.

Joinder in demurrer.

Gray, in support of the demurrer. First, the will should have been pleaded according to its legal effect. The precedent in 2 *Chitt. Plead.* 397, 6th ed., shews the proper mode of stating a devise. If this form of pleading were allowed, it would tend to great prolixity, and compel

parties to raise numerous issues. [*Parke, B.*—There is a further defect in this, that the plea states that there was certain property which the testatrix meant to pass by the words of her will; therefore the question as to what the testatrix intended would be referred to the jury; whereas it ought to be decided by the Court.] *Price v. Williams (a)* is an express authority to shew, that in deducing titles, conveyances are to be pleaded as they operate (*b*).

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Peacock, contra. The object of pleading in this form is to state certain facts on the record, which, if found by the jury, would enable the Court to give judgment on them. A party is at liberty in pleading to set out a document in *hæc verba*. [*Parke, B.*—That is, if he is declaring on the instrument, but not in deducing title. *Pollock, C. B.*—The question in dispute is, whether the testatrix left certain houses to Susan Denne; instead of stating that fact, you set out the will by which she might or might not take them.] If the fact of the will is found by the jury, the Court will put a construction upon it. [*Pollock, C. B.*—Suppose the case of a notice of the dishonour of a bill of exchange, and a party sends the notice addressed in a wrong name, and with a wrong number of the place of residence, still the jury may think that it cannot go to any other person than the one intended; but could you set out the notice in *hæc verba*, and allege that there was no other person in that street to whom the description was applicable?] If the facts stated in this plea had been found as a special verdict, they would have been sufficient to have enabled the Court to give judgment.

PER CURIAM.—There must be judgment for the plaintiff.

Judgment for the Plaintiff.

- (a) 1 M. & W. 6. assuming a lien to have existed,
(b) It was also objected that it was put an end to by the conveyance to the plaintiff.
the plea did not shew any lien as
against Susan Denne; and that,

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The ATTORNEY GENERAL v. REILLY.

In an information by the Attorney General for a breach of the revenue laws, the Court granted a rule to examine a witness for the Crown before the Queen's Remembrancer; but refused to order that the examination should be received in evidence at the trial.

THIS was an information by the Attorney General against the defendant for a breach of the revenue laws.

Sir *F. Thesiger* (Solicitor General) had obtained a rule, calling on the defendant to shew cause why the Attorney General should not be at liberty to examine James Morris, a witness on behalf of the Crown in this case, before the Queen's Remembrancer, and why the said James Morris should not be examined in chief by counsel, or by attorney, for and on behalf of her Majesty, and be cross-examined by counsel or by attorney, for and on behalf of the defendant, if the defendant should so require; and why such examination should not be had and taken *vivâ voce*; and why the said examination, when taken as hereinbefore directed, should not be received in evidence on the trial of this cause.

The affidavits in support of the application stated that James Morris was a material and necessary witness, and that it would not be safe to proceed to trial without his testimony, and that he was so ill that he could not be examined in open Court without imminent danger to his life.

Cockburn and *Humfrey* shewed cause. The Court has no jurisdiction to grant this application. The power which the Court possessed of directing a commission for the examination of witnesses in a case like the present, was derived from its equity jurisdiction, which has been transferred to the Court of Chancery by the 5 Vict. c. 5. [*Pollock*, C. B.—Whatever jurisdiction this Court exercised as a Court of revenue still remains, whether legal or equitable.] The case of *Regina v. Wood* (a) shews that

(a) 7 M. & W. 571; See S. C. 9 Dowl. 310.

the Court did not derive its authority from the 13 Geo. 3, c. 63, ss. 40—44, and 1 Wm. 4, c. 22, s. 1; but from its equity jurisdiction. [*Pollock*, C. B.—That was an application on behalf of the defendant, and though the Crown is not bound by a statute, it may have the benefit of it.] The fact of the Crown making the application does not give the Court any power, unless the statute confers it. The common law jurisdiction depends upon the statutes 13 Geo. 3, c. 63, and 1 Wm. 4, c. 22, which do not apply to actions at the suit of the Crown. [*Parke*, B.—According to *Comyn's Digest*, tit. “*Courts*,” (D 2), this information is a proceeding in the “Court of Pleas.” *Alderson*, B.—It is clear that the Legislature never intended to take from this Court its equity jurisdiction in matters of revenue. If such a construction be put upon the 5 Vict. c. 5, it might be carried to very inconvenient lengths. Lord *Coke*, in his fourth *Institute* (a), speaking of the Court of Equity in the Exchequer Chamber, says, “they have full power and authority to discharge, cancel, and make void all and singular recognizances and bonds made to the King for payment of any debt or sum of money, or for performance of conditions, &c. ;” so that if our jurisdiction in equity is gone for all purposes, we cannot set aside a recognizance; but the parties must be sent to the Court of Chancery.] The 5 Vict. c. 5, has left to the Court all its jurisdiction as a Court of revenue, which it did not exercise as a Court of equity. The first section of that statute enacts “that all the power, authority, and jurisdiction of her Majesty’s Court of Exchequer at Westminster, as a Court of equity, and all the power, authority, and jurisdiction which shall have been conferred on or committed to the said Court of Exchequer, by or under the special authority of any act or acts of Parliament (other than such power, authority, and jurisdiction as shall then be possessed by or be incident to the said Court of Exchequer as a Court of law, or as shall

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(a) p. 118.

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then be possessed by the said Court of Exchequer as a Court of revenue, and not heretofore exercised or exercisable by the same Court, sitting as a Court of equity) shall be, by force of this act, transferred and given to her Majesty's High Court of Chancery," &c. [*Pollock*, C. B.—That is only another and a diffuse mode of expressing that the equity jurisdiction in revenue shall be retained; but not its jurisdiction in equity between subject and subject. *Parke*, B.—From the case of *Jenkins v. Larwood* (a), it would seem that the Court exercised the power under its revenue jurisdiction; for the application was made by motion; if it had been within the equitable jurisdiction, it would have been by bill filed.] In that case it was never supposed that this Court had jurisdiction as a Court of revenue, to direct a commission under the 13 & 14 Car. 2, c. 11, s. 29; but the argument there was, that as the statute of Charles gave jurisdiction to the Court of Chancery, this Court, which was a Court of equity, would also possess the same jurisdiction. [*Pollock*, C. B.—The statute of Victoria appears to me to have taken from this Court all its equitable jurisdiction, and to have left its legal authority for all purposes, and all its equitable authority in cases of revenue.] Assuming that to be so, the Court cannot entertain this application on motion; for it should be by bill filed. [*Pollock*, C. B.—In *Jenkins v. Larwood* the application was by motion.] That was a *qui tam* action; but in *The Attorney General v. Laragoity* (b), the application was on the equity side of the Court. So also in *Bonham v. Leigh* (c).

Jervis, in support of the rule. First, the Court has a general jurisdiction to grant this application. This is a proceeding on the remembrancer's side of the Court for the purpose of collecting the revenue, and, in the performance of that duty it becomes necessary to examine a witness.

(a) Bunb. 13.
 (b) 3 Price, 221.

(c) 5 Price, 444.

In *Jenkins v. Larwood*, (a) the majority of the Court were of opinion that the commission should go, not upon the act of Parliament, but by virtue of the original jurisdiction. That was not, as stated, the case of an ordinary *qui tam* action. Formerly all revenue suits were prosecuted by informers. The law in that respect was altered by the 6 Geo. 4, c. 108, s. 100, which requires all revenue suits to be commenced in the name of the Attorney General; *Manning's Exch. Pract. (revenue branch)* p. 205. Secondly, the Court has jurisdiction under the 13 Geo. 3, c. 63, and the 1 Wm. 4, c. 22. The Courts have given a liberal construction to these statutes. The 13 Geo. 3, c. 63, would seem to apply only to plaintiffs; but it has been held that a defendant may also have the benefit of it; *Grillard v. Hogue* (b). In *Regina v. Wood* (c), and *The Attorney General v. Laragoity* (d), the Crown objected to the defendant's application; and those cases proceeded on the principle that the defendant can have no relief against the Crown, except under the statute of Henry VIII. (33 Hen. 8, c. 39, ss. 60, 61, 62). This Court has a peculiar equitable jurisdiction arising from the right of the Crown to collect its revenue, and that jurisdiction may be exercised on motion, without bill. Thirdly, the statute of Victoria has not taken away the equitable jurisdiction of this Court in revenue cases.

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Cur. adv. vult.

The judgment of the Court was delivered by

POLLOCK, C. B.—In this case a rule was moved for to examine a witness on interrogatories, and that the answers should be received in evidence. The case was argued a few days ago, and a case in *Bunbury* (e) was relied on as an authority for the application. Two other cases have since been found by examining the records of the Court. We think, therefore, that the rule ought to be made absolute for the examination. We at present pronounce no

(a) Bunb. 13.

9 Dowl. 310.

(b) 4 Moore, 313; See S. C.

(d) 3 Price, 221.

1 B. & B. 519.

(e) *Jenkins v. Larwood*, p. 13.

(c) 7 M. & W. 571; See S. C.

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opinion as to the effect of that examination as evidence at the trial. It appears to us that the question is not to be disposed of on motion. The officers of the Crown are to have the power of examining the witness, and the defendant will be at liberty to except to the reception of that evidence at the trial. The rule, therefore, will be absolute so far only as relates to the examination.

Rule accordingly.

CAPNER and Others v. MINCHER, GUEST, and Others.

Where a defendant, under terms of pleading issuably, pleads a non issuable plea, the plaintiff may sign judgment, notwithstanding the plea has been objected to, and allowed by a Judge at Chambers.

THE declaration contained a count on a promissory note, payable to the plaintiffs' order on demand, and also a count for money due on an account stated. The defendants being under terms of pleading issuably, obtained a Judge's order for leave to plead the following several matters:

First. To the first count, that defendants did not make the note therein mentioned.

Secondly. To the same count, that the note was made subject to an agreement that the defendants should have notice before proceedings were commenced; but that no notice was ever given.

Thirdly. To the same count, that the note was made subject to an agreement that payment of it should not be enforced, unless default were made by W. Mincher, one of the makers, in payment of certain instalments; and that the said instalments were regularly paid.

Fourthly. To the last count, *nunquam indebitatus*.

These pleas having been accordingly delivered, the plaintiffs signed judgment, on the ground that the second and third were not issuable.

Montague Smith moved to set aside the judgment upon affidavit verifying the pleas, and stating that the Judge had allowed them, notwithstanding they were objected to at Chambers as not issuable. He submitted, that though they might be bad on demurrer, they could not be treated

as not issuable within the terms of the order. [*Parke, B.*—They will not decide the action one way or the other.] At the trial it might appear that the agreement was in writing, and made at the same time as the note. [*Alderson, B.*—The pleas would be proved by shewing a parol agreement; and so an issue would be found for the defendants, totally beside the merits of the case.] At all events, as the pleas were allowed by the Judge, the plaintiffs should not have signed judgment, but ought to have applied to the Court to rescind the Judge's order. [*Alderson, B.*—When a Judge at Chambers makes an order allowing several pleas, he does not consider whether they are issuable; because he knows that if they are not, the plaintiff may sign judgment.] It is conceded, that according to the case of *Adams v. Wordley (a)*, the pleas should have stated the agreement to be in writing; but the plaintiffs may intend to question the correctness of that case. [*Parke, B.*—The second plea is clearly not an issuable plea; the plaintiffs were, therefore, entitled to sign judgment.]

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PER CURIAM.

Rule refused.

(a) 1 M. & W. 374.

HARRISON, Executor, &c. v. WRIGHT.

CASE against the sheriff of Nottinghamshire for a false return of nulla bona to a writ of fieri facias issued by the plaintiff on a judgment obtained by him against one E. Smith. Pleas, not guilty and nulla bona.

At the trial before *Coltman, J.*, at the Nottinghamshire Summer Assizes, it appeared, that after the sheriff had

Upon an application by the sheriff, under the Interpleader Act, a Judge at Chambers has no power to determine the rights of the parties

without their consent; and such consent should appear on the face of the order.

But where, upon such an application, the Judge made an order which was not stated to be by consent, but under which the parties acted; it was held to be binding, as an adjudication upon a matter submitted to the Judge.

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seized certain goods in the possession of E. Smith, under the writ of fieri facias, one Stansfield set up a claim to them, and that thereupon the sheriff took out a summons under the Interpleader Act, and the parties having attended before *Rolfe*, B., he, with their consent, made the following order—

“Upon hearing the attorneys or agents for the plaintiff, for the sheriff of Notts, and Thomas Stansfield the claimant, and upon reading the two affidavits of Francis Rippingale, the affidavit of William Plaskitt, and the two affidavits of Thomas Stansfield; I do order that the claims of the plaintiff be barred, and that the sheriff of Notts do deliver up possession of the goods in question to Thomas Stansfield, the claimant: and I do order that the plaintiff do pay to Thomas Stansfield his taxed costs of this summons, and of the proceedings thereon; and that the plaintiff do also pay to the said sheriff the costs of possession, after the 24th day of December last. Dated the 3rd day of January, 1843.”

The sheriff accordingly gave up possession of the property to Stansfield, and the plaintiff issued a *ca. sa.*, under which the defendant was imprisoned. The plaintiff paid the costs of Stansfield and of the sheriff; but having subsequently discovered that the defendant possessed other property besides that claimed by Stansfield, he ruled the sheriff to return the writ of fieri facias; and, upon the return of *nulla bona*, brought the present action. It was objected, on the part of the plaintiff, that a Judge at Chambers had no jurisdiction to make such an order. The learned Judge told the jury, that in his opinion the order was conclusive; and they found a verdict for the defendant. A rule *nisi* having been obtained for a new trial;

Whitehurst and *Mellor* shewed cause. It may be conceded, perhaps, that under the 1st section of the 1 & 2 Wm. 4, c. 58, the Court would not have the power to make

an order of this description without the consent of the parties; but it is submitted, that by the 6th section, which applies to sheriffs, &c., the Court is enabled to do so. That section authorizes the Court to call the parties before them, "and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case." The words "hereinbefore contained" refer to the first section, and incorporate its provisions with the more stringent powers conferred upon the Court by the sixth. The 1 & 2 Vict. c. 45, enables a Judge at Chambers to exercise the same power in this respect as the Court. [*Parke*, B.—There is no foundation for such an interpretation of the Interpleader Act. It is clear that the Judge had no power under that act to dispose of the rights of the parties upon affidavit without their consent.] Assuming then a consent to be necessary, it was in fact given, and need not be stated on the face of the order. *Muskett v. Drummond* (a), and *Christie v. Unwin* (b), will perhaps be cited on the other side; but those were cases of orders in bankruptcy, where the Lord Chancellor does not act under his ordinary jurisdiction, but as any other individual upon whom the bankruptcy jurisdiction might be conferred. Where the proceedings are in an inferior Court, it is necessary to state the facts which give the Court jurisdiction; but it is not so where the proceedings are in a superior Court; *Peacock v. Bell* (c); *Taylor v. Clemson* (d). In an order under the statute of Anne, which enables the Court or a Judge to allow a defendant to plead several matters, it is not necessary to state all the proceedings on the face of the order. [*Parke*, B.—There nothing is necessary but the

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(a) 10 B. & C. 153; See S. C.
5 M. & R. 210.

(b) 11 A. & E. 373; See S. C.
3 P. & D. 204.

(c) 1 Saund. 73; See S. C.
1 Sid. 330.

(d) 2 Q. B. 978; See S. C.
2 G. & D. 346.

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order of the Court.] Thirdly, all parties having acted under this order, it binds the plaintiff by way of estoppel. If the plaintiff meant to repudiate the order, he should have given the sheriff notice to that effect; but, instead of so doing, he pays the costs as directed by the order. [*Parke*, B.—Suppose there had been no act of Parliament relating to disputed claims, and the parties had issued a summons to appear before my Brother *Rolfe*, and had there consented that he should adjudicate upon the case, would not his decision have been good as an award, and binding on the parties?] Certainly it would. They also cited, *Gregg v. Wells* (a).

M. D. Hill and *Humfrey*, in support of the rule. The plaintiff is not concluded by the adjudication of the Judge; for at the time of appearing, he was not aware that his debtor possessed other property which the sheriff might have seized and sold. An agreement is not binding, if made under a mistake of law or fact. A receipt is evidence of payment; but the party who gave it, may nevertheless prove that the debt has not been paid. [*Parke*, B.—All parties agree that the question shall be determined by the Judge, and that binds them.] The plaintiff may shew that he has been deceived. This is a hostile proceeding, and the Court will not infer consent when no consent appears on the face of the order. The plaintiff might not have known that he had any right to withhold his consent. Where an independent party voluntarily submits to a reference, it is no doubt binding upon him; but this is a proceeding by course of law. [*Parke*, B.—The clear intention was, that the Judge should decide whether the goods to which the order related could be taken in execution.] A party declared bankrupt surrenders to the fiat, but that does not estop him from disputing its validity. So where land is recovered by ejectment, the defendant submits to the execution; but if

(a) 10 A. & E. 90; See S. C. 2 P. & D. 296.

within twenty years he discovers error in the proceedings, he is not precluded from suing out a writ of error ; though, in the mean time, a third party may have purchased the property.

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PARKE, B.—We have no doubt that the order is conclusive ; not as a proceeding under the Interpleader Act, (for in that respect it is bad for want of a statement of consent) ; but as an adjudication upon a matter submitted to the Judge. There is ample evidence of consent, as the matter was disposed of in the presence of all parties ; and as they agreed to submit to the decision of the Judge, they are bound by it. The question submitted to the Judge was, whether the plaintiff had a right to insist upon the sheriff going on to sell the goods ? The Judge decided that the sheriff should not sell, and that the plaintiff should pay the costs. That adjudication is final and conclusive.

ALDERSON, B.—I am of the same opinion. The order is conclusive, because the parties agreed that my Brother *Rolfe* should determine the matter, and he has determined it. The question is to what it extends, and I think it must be construed to extend to all the goods at that time on the farm.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

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SLADE v. HAWLEY, Bart.

In an action against the sheriff for the improper execution of a *fi. fa.*, and for a false return, the declaration stated that a *fi. fa.* indorsed to levy 66*l.* 9*s.* 8*d.*, besides 16*s.* for the writ, officers' fees, poundage, &c., was delivered to the defendant, who, by virtue thereof, seized and took in execution goods of great value, to wit, of the value of the *moneys so indorsed* on the writ, and then could, and might, and ought to have levied the whole of the *moneys* thereout; yet the defendant did not levy the whole of the *moneys so indorsed*, but only a portion, to wit, the sum of 60*l.*, and falsely returned that he had levied the sum of 43*l.* 15*s.* 9*d.*, and that the debtor had no more goods:

CASE against the sheriff of Kent for the improper execution of a *fi. fa.*, and for a false return. The declaration contained a count which stated, in the usual form, that the plaintiff, by the judgment of the Court, had recovered against one R. Hewitt a debt of 64*l.*, and 2*l.* 9*s.* 8*d.* for damages; that he, thereupon, issued a writ of *fi. fa.*, directed to the sheriff of Kent, indorsed to levy 66*l.* 9*s.* 8*d.*, besides 16*s.* for the writ, officer's fees, poundage, &c. That the writ was delivered to the defendant, who was the sheriff of Kent, who, by virtue thereof, seized and took in execution divers goods and chattels of the said R. Hewitt of great value, to wit, of the moneys so indorsed on the said writ; and then, could, and might, and ought to have levied the whole of the said moneys thereout. Yet the defendant did not nor would levy out of the said goods and chattels, the whole of the moneys so indorsed on the said writ; but only a portion of the said moneys, to wit, the sum of 60*l.* And that the defendant afterwards falsely returned that he had levied and made of the goods and chattels of Hewitt the sum of 43*l.* 15*s.* 9*d.*, besides officers' fees, sheriff's poundage, &c., which said sum of 43*l.* 15*s.* 9*d.* he, the said sheriff, had ready to be paid to the plaintiff in part satisfaction of his debt, &c.; and that the said R. Hewitt had not any other or more goods or chattels in his, the said sheriff's bailiwick, whereof he could cause to be levied the residue of the said debt, &c. Whereas, in truth and in fact, the defendant had levied under the said writ, a larger sum of money than the said sum of 43*l.* 15*s.* 9*d.*, in the said return mentioned, to wit, the sum of 60*l.* levied

Held, on special demurrer, first, that the words "*moneys so indorsed*" meant not only the debt, but the debt together with officers' fees, sheriff's poundage, &c. Secondly, that the breach was defective, in not alleging that a reasonable time had elapsed for converting the goods seized into money. Thirdly, that the second breach was well assigned; inasmuch as under the circumstances stated, it was a breach of duty to make a return of nulla bona as to any part.

as before mentioned, which, after the payment of officers' fees, sheriff's poundage, &c., ought to have been applied in part satisfaction of the moneys indorsed on the said writ, and directed to be levied as aforesaid. By means of which premises, the plaintiff has been and is greatly injured and deprived of the means of obtaining a portion of the said moneys so indorsed as aforesaid, and which is still unpaid and unsatisfied, and is likely to lose the same.

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Special demurrer, assigning for causes (amongst others) that the causes of action were not set forth with sufficient certainty and particularity. That as to the first breach, no cause of action was shewn, and that the plaintiff had wholly failed to show that, either by lapse of time or otherwise, the defendant had any reasonable opportunity to complete and perfect the said levy and execution, or to sell, or that he had, in fact, sold the whole. That no breach of duty or cause of action was shown in the second breach; that the plaintiff had wholly failed to aver that after payment of such sums out of the levy as by law were to be deducted therefrom, a larger sum remained applicable to the plaintiff's execution than the said sum of 43*l.* 15*s.* 9*d.*

Joinder in demurrer.

Peacock, in support of the demurrer. The first breach is bad, as it does not show any neglect of duty on the part of the defendant. The words "could and might, and ought to have levied," are a mere conclusion of law, and do not amount to a statement of a wrongful omission to do the act. The question is as to the meaning of the words "to wit, of the value of the moneys so indorsed on the writ." If that allegation is not material, then the only statement is, that the sheriff seized goods of great value; if, on the other hand, that allegation is material, the question arises whether it means that the sheriff received the moneys indorsed on the writ; or whether that he received sufficient to levy that sum together with his poundage, officers' fees, &c.? It is

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Held, on special demurrer, first, that the words "moneys so indorsed" meant not only the debt, but the debt together with officers' fees, sheriff's poundage, &c. Secondly, that the breach was defective, in not alleging that a reasonable time had elapsed for converting the goods seized into money. Thirdly, that the second breach was well assigned; inasmuch as under the circumstances stated, it was a breach of duty to make a return of *nulla bona* as to any part.

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Special demurrer, assigning for causes (amongst others) that the causes of action were not set forth with sufficient certainty and particularity. That as to the first breach, no cause of action was shewn, and that the plaintiff had wholly failed to show that, either by lapse of time or otherwise, the defendant had any reasonable opportunity to complete and perfect the said levy and execution, or to sell, or that he had, in fact, sold the whole. That no breach of duty or cause of action was shown in the second breach; that the plaintiff had wholly failed to aver that after payment of such sums out of the levy as by law were to be deducted therefrom, a larger sum remained applicable to the plaintiff's execution than the said sum of 43*l.* 15*s.* 9*d.*

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consistent with the allegation that the goods might have been sufficient to levy the moneys indorsed on the writ, and yet insufficient when the right of the sheriff to retain his poundage is taken into account. If the debt were 60*l.*, and the goods of the value of 60*l.*, the sheriff would only be bound to return sixty pounds, minus his poundage and expenses. This breach, taken without the return, amounts to no breach at all; if taken with the return, the facts shew that the return is not false, but true. The substance of the allegation is, that he did not levy the whole moneys, but only a portion. [*Pollock*, C. B.—The breach seems to be this, that the sheriff might have levied the whole, but levied only a part, and has, therefore, disregarded his duty by making a false return]. It only states that he might have levied all the moneys indorsed on the writ, not that he might have levied those moneys together with his poundage. The sheriff is, in fact, charged with not levying his poundage. Again, the declaration should have stated that a reasonable time had elapsed in which he could have levied. The second breach is inconsistent with the facts stated in the declaration. [*Pollock*, C. B.—Is the word “levy” applicable to anything but the plaintiff’s debt? *Parke*, B.—The 43 Geo. 3, c. 46, s. 5, enables the plaintiff to “levy” the poundage, fees, and expenses of the execution, over and above the sum recovered by the judgment.] If the sheriff levied 43*l.* 15*s.* 9*d.*, the fact alleged by way of breach might be perfectly true, and the sheriff have done no wrong. He cited also, *Phillips v. Bacon* (a).

Kennedy, contra. There is no ambiguity. The first breach is, that although the sheriff could have levied all the money; yet he did not levy the whole, but only a small part thereof. He has, therefore, committed a breach of duty; first, by not levying; and secondly, by making such a return. The words, “could and might and ought to have levied,” are not, as is stated, a mere conclusion of law,

(a) 9 East, 298.

but a direct allegation of a breach of duty. In a declaration less particularity is required than in a plea, and it is sufficient to state the general result of the act of omission; viz. that the sheriff might have levied, but did not levy. In an indictment or count, certainty to a general intent is sufficient; *Long's case* (a); *Com. Dig.* tit. "Pleader," (C. 24); and the rule is more particularly applicable where the fact is especially within the cognizance of the party complained against. A sheriff is not bound to specify in his return the particular goods taken, nor the sum for which each article sold; *Willett v. Sparrow* (b); therefore, it would be hard to require more particularity from the party complaining of the return. In debt on bond, conditioned that B. should account for moneys received; it is sufficient to allege that B. had received divers moneys which he had not accounted for; *Barton v. Webb* (c); *Calvert v. Gordon* (d). So here it is enough to state that the sheriff might have levied the whole moneys indorsed on the writ; but did not levy them. It is clear that a writ of venditioni exponas would not lie; because, for that purpose the second breach must be connected with the first. [*Parke, B.*—If the word "levy" means "convert into money," no venditioni exponas would be necessary, provided it is sufficiently alleged that he has levied.] An action will lie against a sheriff for wilfully delaying to sell the goods; *Carlile v. Parkins* (e); and it is not necessary to wait until the return of the venditioni exponas; *Jacobs v. Humphrey* (f); *Aireton v. Davis* (g). It is immaterial whether the poundage is or is not included in the sum levied; the meaning of the allegation is, that the sheriff has levied money applicable to the plaintiff's debt; *Drewe v. Lainson* (h).

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(a) 5 Rep. 120.

(b) 6 Taunt. 576; See S. C. 2 Marsh. 293.

(c) 8 T. R. 459.

(d) 7 B. & C. 809; See S. C. 1 M. & R. 497.

(e) 3 Stark. 163.

(f) 2 Cr. & M. 413; See S. C. 4 Tyr. 272.

(g) 3 M. & Scott, 138; See S. C. 9 Bing. 740.

(h) 11 A. & E. 529; See S. C. 3 P. & D. 245.

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Peacock, in reply. The breach in effect alleges that the sheriff has not levied the whole debt, poundage, and fees. Suppose that it had alleged that the sheriff omitted to levy the poundage or fees, would that have been a good breach? Or suppose that under the plea of not guilty, it appeared that the sheriff had not levied the poundage and fees, could the plaintiff have recovered? The precedent in *Lewis v. Alcock* (a), states that a reasonable time for the sheriff to make his return had elapsed; and the case of *Stavart v. Eastwood* (b), is an authority to shew that such an allegation is necessary.

Cur. adv. vult.

The judgment of the Court was delivered by

PARKE, B.—This case stood over for our decision. The action is against the sheriff for the improper execution of a writ of fieri facias, and for a false return.

The first count of the declaration is in the usual form, so far as relates to the delivery of the writ to the sheriff; and it is averred that the writ was indorsed with directions to the sheriff to levy 66*l.* 9*s.* 8*d.*, besides 16*s.* for that writ, officers' fees, sheriff's poundage, and all incidental expenses; and being so indorsed, before the execution thereof was delivered to the defendant, who was the sheriff of the county of Kent; and that afterwards the sheriff seized divers goods and chattels of the debtor of great value, to wit, of the value of the moneys so indorsed on the said writ and directed to be levied as aforesaid, and then could and might and ought to have levied the whole of the said moneys thereout; yet that the defendant did not nor would levy out of the said goods and chattels the whole of the moneys so indorsed on the said writ, but levied thereout only a portion of the said moneys, to wit, the sum of 60*l.*; and that the defendant afterwards falsely returned to the

(a) 3 M. & W. 188; See S. C. 6 Dowl. 389.

(b) 11 M. & W. 197; See S. C. 2 Dowl. 988, N. S.

Court that he had levied of the goods and chattels of the debtor, the sum of 43*l.* 15*s.* 9*d.*, besides officers' fees, sheriff's poundage, and other charges, which said sum of 43*l.* 15*s.* 9*d.* he the said sheriff had ready to pay to the plaintiff at the time, &c.; and that he the said debtor had not any other or more goods and chattels in the sheriff's bailiwick, whereof the sheriff could cause to be levied and made the residue of the debt, &c.; whereas in truth and in fact, the defendant, as such sheriff as aforesaid, had levied under the said writ a larger sum of money than the said sum of 43*l.* 15*s.* 9*d.*, in the said return mentioned, to wit, the sum of 60*l.* before mentioned, which after payment of officers' fees, sheriff's poundage, &c., ought to have been applied in satisfaction of the plaintiff's debt; by reason whereof the plaintiff had been injured and deprived of the recovery of the rest of the debt.

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There was to this count a demurrer and an assignment of a variety of special causes. On the argument of this case, several objections were urged to this count. One was, that if the word "moneys" was taken to mean the debt only, the first breach was imperfect; because although the defendant might have levied the whole debt, there being enough to satisfy it, and omitted to do so, it did not follow he was guilty of a breach of duty, inasmuch as he might have levied all the debt and lawfully detained part of the proceeds for his poundage. We think, however, that the true construction of this count is, that the word "moneys" embraces the debt, officers' fees, and sheriff's poundage, &c., in short all the items indorsed on the writ.

The objection then assumes another shape, namely, that the first breach is insufficient; because, although it is alleged that the defendant did not levy the whole money; yet it does not appear that he could have done so in the reasonable discharge of his duty to both parties; or that a reasonable time had elapsed for converting the goods seized into money: and this objection appears to us to be tenable.

The plaintiff then insists that the second breach for a

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false return was properly alleged; for in the inducement it is averred, that the defendant took the goods to the full value of all the moneys indorsed on the writ, and might have levied the whole of the moneys thereout; and although upon that statement it could not be inferred that he might have done so, or that a reasonable time had elapsed; yet it was a breach of duty under the circumstances stated to make a return of nulla bona as to any part of it: it was a false return; because, according to the allegations in the inducement, there were goods sufficient: and we are of this opinion. This view of the case makes it unnecessary to consider, whether the allegation which follows the statement in the false return, containing the statement of the damages, is well pleaded or not: that may be rejected.

For these reasons we think that the second breach is well assigned; and that, on that breach, our judgment must be for the plaintiff.

Judgment for the Plaintiff (a).

(a) The plaintiff entered a re-mittitur damna as to the first inquiry to assess damages on the breach, and sued out a writ of other.

CHOWNES v. BROWN.

Where an order of reference contains a clause restraining the parties from bringing a writ of error, they are precluded from moving in arrest of judgment.

THIS was an action by a landlord against his tenant, for not cultivating the land in a husbandlike manner. The cause came on for trial at the Huntingdon Summer Assizes, when it was referred to arbitration on the usual terms. The arbitrator awarded in favour of the plaintiff.

In Michaelmas Term, the defendant obtained a rule nisi to arrest the judgment, on the ground that the declaration was bad for want of an averment that the defendant became tenant "at the request" of the plaintiff.

Gunning shewed cause against the rule.

Byles, Serjt., and *O'Malley*, were heard in support of the rule.

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Cur. adv. vult.

On a subsequent day,

PARKE, B., said—On looking into this case we find that the motion ought never to have been made; for by the terms of the reference the parties were not to bring a writ of error; and, therefore, the defendant cannot move in arrest of judgment. The rule must be discharged.

Rule discharged.

HUBBART v. PHILLIPS.

THE defendant in this case had obtained a rule, calling on the plaintiff's attorney to shew cause why all proceedings should not be stayed, and why the attorney should not pay the defendant his costs, and also the costs of this application. The ground of the application was, that the action had been brought by the attorney, without any authority from the plaintiff.

Where an attorney brings an action in the name of a person without his authority, the Court will stay the proceedings, on the motion of the defendant, and make the attorney pay the costs.

W. H. Watson shewed cause. The plaintiff is the only person who is entitled to move to stay the proceedings; *Doe dem. Hammek v. Fillis (a)*; *Doe dem. Shepherd v. Roe (b)*. From an *Anonymous case in Salkeld's Reports (c)*, it would seem, that the only ground for the Court interfering on the motion of the defendant, is the insolvency of the attorney. [*Alderson*, B.—If two parties suffer from the wrongful act of an attorney, are they not both to have a remedy? *Pollock*, C. B.—What right can an attorney have

(a) 2 Chit. Rep. 170.

(c) 1 Salk. 88.

(b) *Ib.* 171.

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to take up a stray cause of action? *Parke, B.*—The case of *Robson v. Eaton (a)*, is decisive. From that it appears, that if a defendant pay money to an attorney, who sues in the plaintiff's name without his authority, the defendant is not discharged by such payment.]

Cleasby, in support of the rule, was not called upon.

PER CURIAM.—The rule must be absolute.

Rule absolute accordingly.

(a) 1 T. R. 62.

M'INTYRE v. MILLER and Others.

In an action by a joint stock company, the declaration commenced by stating that M. the secretary "for the time being," of the company, complains of C. D., who has been summoned to answer the plaintiff as such secretary by virtue of a writ, issued on the 2nd of March, &c. The defendant pleaded,

ASSUMPSIT for money had and received, money lent, &c. The declaration was dated the 29th of March, and commenced as follows:—Patrick M'Intyre, the secretary for the time being of a certain company, called or styled The United Kingdom Life Assurance Company, (the plaintiff in this suit), by his attorney, complains of M. H. Miller, &c. (the defendants in this suit) who have been summoned to answer the said plaintiff as such secretary as aforesaid, by virtue of a writ issued on the 2nd day of March, A. D. 1843, &c.

The defendants pleaded (amongst other pleas) that after the making of the said promises and before the commencement of the suit, to wit, on, &c., the said company released (amongst other pleas) a plea to which the plaintiff demurred; the defendant rejoined by admitting the plea to be insufficient, and abandoned all verification thereof. The plaintiff proceeded to trial, and obtained a verdict on the other issues; and the defendant brought a writ of error, on the ground; first, that it did not appear that the plaintiff was secretary at the time the writ issued; secondly, that the defendants could not, after demurrer, abandon their plea: *Held*, on motion to set aside the writ of error as frivolous; that it sufficiently appeared that the plaintiff was secretary at the commencement of the suit; and that the other ground of error was not frivolous.

Semble, that the defendant was not at liberty to abandon his plea, (per *Alderson, B.*)

to the defendants the said causes of action in the declaration mentioned, and each and every of them. Verification.

Special demurrer, assigning amongst other causes, that the plea was too vague and general; that it was not stated whether the release was express, or by operation of law; and whether it was in writing or under seal; that the defendants had not brought the same into Court, &c.

The defendants rejoined as follows:—And as to the demurrer of the plaintiff by him above pleaded to the last plea of the defendants, the defendants say, that inasmuch as they cannot deny that the said last plea is insufficient in law, they freely here in Court relinquish the same, and abandon all verification thereof: therefore let no regard whatsoever be further paid to the said last plea of the defendants. Therefore, to try the several issues above joined, the sheriffs are commanded, &c.

The plaintiff went to trial upon the other issues, and obtained a verdict. The defendants sued out a writ of error, on the grounds that it did not appear that the plaintiff had any title to sue, and that the defendants could not withdraw the plea demurred to. The plaintiff then obtained a rule, to shew cause why the writ of error should not be quashed as frivolous; or why the plaintiff should not be at liberty to issue execution, notwithstanding the writ of error.

C. Edwards shewed cause. The writ of error is not frivolous, for the declaration does not shew that the plaintiff had any right to sue for this debt. The plaintiff is stated to be secretary “for the time being;” that is, on the day of the date of the declaration; but there is nothing to shew that he was secretary at the time the writ issued. [*Parke, B.*—It is alleged that the defendant “was summoned to answer the plaintiff as such secretary as aforesaid, by virtue of a writ issued on the 2nd day of March;” that is sufficient.] Secondly, the defendants cannot abandon the plea demurred

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to. The same point arose in this Court in two cases, *Cooper v. Painter*, and *Hutton v. Turk* (a).

(a) *Bovill*, *amicus curiæ*, stated these cases to the Court, to the following effect:—

COOPER v. PAINTER.

THIS was an action against the sheriff, for not arresting a defendant in another action at the suit of the present plaintiff. The defendant pleaded several pleas; to two of which the plaintiff demurred, and the defendant thereupon entered a relinquishment of those pleas to the following effect; viz., that the defendant forasmuch as he could not deny that those pleas were insufficient in law, freely relinquished the same, and abandoned all verification thereof, and therefore prayed that no further regard should be had to the same. The plaintiff, after a motion for judgment as in case of a nonsuit, gave a peremptory undertaking to try at the next sittings.

Pearson had obtained a rule, calling on the defendant to shew cause why the peremptory undertaking should not be enlarged, and why the defendant should not join in demurrer, or the plaintiff be at liberty to sign judgment for want of such joinder; and why the defendant should not pay the costs of the application.

Bovill shewed cause, and contended that the entry was perfectly regular, and that it was warranted by an entry to be found in *Rastell's Entries*, tit. "*Appeals*," p. 49, pl. 6; *Ibid*, p. 51 a, pl. 15 (b).

(b) The following is the entry; *Rastell*, p. 49, pl. 6. "Super quod idem W. placitum prædictum in cassationem brevis prædicti, superius placitatum, relinquit, ac dicit et bene cognoscit quod breve originale prædictum inde bonum et legale, et in nullo vitiosum existit, &c.; et petit quod curia domini regis hic procedat ad captionem juratorum prædictorum ad triandum exitum prædictum inter ipsum et prædictum G. superius junctum," &c.

The entry in p. 51 (a), pl. 15, is as follows: "Et prædictus A. petit judicium de breve, &c., quia dicit quod tempore impetrationis brevis originalis loquelæ prædictæ non fuit aliqua talis in rerum naturâ J. A. uxor. J. A. prout per breve illud supponitur, et hoc paratus est verificare," &c.

Replication: "Et prædictus J. J. filius dicit quod breve suum prædictum ratione preallegatæ cessari non debet, quia dicit quod tempore impetrationis brevis originalis loquelæ prædictæ, scilicet quarto die, &c., fuit talis in rerum naturâ, J. A. uxor. J. A. prout per breve illud supponitur et hoc petit quod inquiretur per patriam; et prædictus A. similiter, &c."

Jervis and *Butt* in support of the rule. The defendants admit their plea to be bad : they are at liberty to withdraw

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That there was no power to compel a party to join in demurrer, and no power in the Court to award costs. That under the statutes, the costs would be given only where the parties put themselves upon the judgment of the Court, and judgment was actually given ; 8 & 9 Wm. 3, c. 11, s. 2 ; 4 Ann. c. 16, s. 5 ; 3 & 4 Wm. 4, c. 42, s. 34. That in the case in question, no judgment was or could be given by the Court upon the demurrer or for costs. That the relinquishment of a plea demurred to, was similar to the case of abandonment of a plea by not rejoining ; *Petrie v. Fitzroy*, 5 T. R. 152 ; or of abandonment by the plaintiff by a nolle prosequi of a particular count upon its being demurred to : or of relinquishment by a defendant of his pleas at the trial, or upon a cognovit. That the rule of Hilary Term, 2 Wm. 4, r. 46, which prevented a party from waiving his plea without leave of the Court, or a Judge, applied only to the practice of waiving one plea, and pleading another after delivery of the issue ; *Tidd's Pract.* 674, 9th edit. ; *Tidd's New Pract.* 413 ; and merely dispensed with the rule for the defendant to abide by his plea ; that the present was not a waiver of that description, but an absolute abandonment by not joining in demurrer ; and that there was no power in the Court to prevent a party from making default, or to compel him to join in demurrer.

The Court, after hearing *Pearson* in support of the rule, directed the peremptory undertaking to be enlarged, in consequence of the novelty of the entry ; but in other respects discharged the rule, directing that the pleas demurred to should be struck out.

HUTTON v. TURK.

THIS was a similar case to *Cooper v. Painter*. The plaintiff had demurred to one of the defendant's pleas ; whereupon the latter relinquished it by an entry similar to the one made in the last case.

The plaintiff then applied to *Coleridge, J.*, at Chambers, for an order that the plea should be struck out, and that the defendant

"Ad quem diem coram domino rege apud W. veniunt tam prædictus J. J. filius, quam prædictus A. et T. B. in propriis personis suis, et super hoc prædictus J. J. filius, &c. relictâ verificatione sua superius pretensâ dicit quod ipse non potest dedicere, sed concedit, et bene cognoscit, quod tempore impetrationis brevis originalis loquelæ prædictæ non fuit aliqua talis in rerum naturâ J. A. uxor prout per breve illud supponitur, prout prædictus A. in cassationem ejusdem brevis superius placitando allegavit. Ideo consideratum est quod prædictus J. J. filius, &c. nihil capiat per breve suum, &c., et quod A. quoad secundam ejusdem J., eat inde sine die, &c."

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it from the consideration of the Court. The proceeding resembles that of a retraxit on a new assignment. In principle, there seems no reason why a defendant may not abandon a plea which he owns to be bad. Where there is a plea in abatement and the plaintiff cannot deny it, he enters on the roll a *cassetur breve*. The same course may be pursued in this case. The plaintiff cannot be prejudiced; for this is not a case to which costs would attach, under the statute of Gloucester. The effect of the rejoinder is to remove from the record the plea and all subsequent proceedings. [*Parke*, B.—Suppose a defendant chooses to say that a plea is bad when in truth it is good, what judgment are the Court to give? We must look at the whole record.]

POLLOCK, C. B.—The rule must be discharged. We ought not to allow execution to issue after allowance of a writ of error, unless the grounds of error are clearly frivolous. We cannot say they are so here, for two cases have been referred to, in which the Court appear to have come to no determination on the point. I think there is sufficient doubt to justify the defendants in taking the opinion of a Court of error.

should pay the costs incurred by it; but the learned Judge refused to interfere.

Crompton afterwards obtained a rule to the like effect, against which,

Bovill shewed cause. He admitted that the proper course was to strike out and take no further notice of the plea; but contended that a rule was not necessary for that purpose, and with regard to the costs, urged the same arguments as in *Cooper v. Painter*.

The Court said they had not the power of compelling the defendant to pay the costs; and that the proper course would be to strike out the plea and demurrer, which was done accordingly, and the rule was discharged.

PARKE, B.—This is quite a new point, and the writ of error cannot be said to be frivolous. We only interfere when the alleged grounds of error do not admit of an argument.

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ALDERSON, B.—I am of the same opinion. I think that in this case the Court would be bound to give judgment on the whole record; therefore, the statement of the defendants, that they had no defence, would go for nothing; unless verified by the judgment of the Court. I am therefore inclined to think that the defendants cannot abandon their plea.

PLATT, B., concurred.

Rule discharged (a).

(a) The plaintiff afterwards thereto, and the rejoinder to such obtained a Judge's order for demurrer, on payment of costs; striking out of the nisi prius which was accordingly done. record the last plea, the demurrer

JAMES v. WILLIAMS.

THIS was an action of assumpsit by the indorsee against the acceptor of a bill of exchange for 100*l*.

The defendant had pleaded, amongst other pleas, that after the bill of exchange had become due and payable, one Phillip Watkins delivered to the plaintiff, at his request, divers bills of exchange for the payment of certain sums of money therein respectively mentioned, and amounting, in the whole, to more than the sum of 100*l*., and to a large and sufficient sum of money, to wit, the sum of 380*l*., for and on account of, amongst other things, the said sum of money specified in the said bill of exchange in the said declaration mentioned, and all damages, &c., which said bills of exchange the plaintiff then took and received from the said Phillip Watkins for and on account of, amongst other things, the said sum of money in the said declaration

A plea of the delivery of a bill of exchange or promissory note, "for and on account" of the debt for which the plaintiff sues, must shew, upon the face of it, that it was a negotiable instrument, in which the plaintiff took an interest; and if it omit to do so, the defect will not be cured by verdict.

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mentioned, and the damages sustained by the plaintiff; and that the said bills of exchange were respectively paid and satisfied before the commencement of this suit, to wit, when they became due. Verification.

To this plea the plaintiff had replied, that the said bills of exchange were not paid and satisfied, modo et formâ.

The cause was tried before *Rolfe*, B., at the Glamorganshire Summer Assizes, and a verdict found for the defendant.

Chilton had obtained a rule nisi to enter judgment for the plaintiff on this issue, non obstante veredicto; against which,

E. V. Williams and *Benson*, shewed cause. This plea is good upon the authority of *Kearslake v. Morgan* (a). There the plea stated that the defendant, who was payee of a promissory note, indorsed it to the plaintiff "for and on account of the debt," and that was held sufficient, without alleging that it was received in satisfaction. Where there is an acceptance of a negotiable instrument in respect of a debt, it must, primâ facie, be taken to have been given in satisfaction. In *Mercer v. Cheese* (b), the defendant pleaded that one T. M., who was jointly liable with the defendant, accepted a bill drawn upon him by the plaintiff, and that the plaintiff took and received the bill from the said T. M. for and on account of the sum of 150*l.*; and the Court held the plea sufficient. *Maillard v. The Duke of Argyle* (c) and *Kendrick v. Lomax* (d), are authorities to the same effect. Besides, as the jury have found that the bills have been paid, it therefore appears, by the record, that there is an actual satisfaction of the debt. As to the objection that the plea does not shew that the bills of

(a) 5 T. R. 513.

(b) 4 M. & G. 804; See S. C. 5 Scott, N. R. 664; 2 Dowl. 619, N. S.

(c) 6 M. & G. 40; See S. C. 6 Scott, N. R. 938, ante, vol. 1. p. 536.

(d) 2 C. & J. 405.

exchange were of sufficient amount to cover the plaintiff's claim together with the "other things" mentioned in the plea; that defect might have been fatal on special demurrer, but is cured by pleading over. If the plaintiff had traversed that allegation, the defendant must have proved that the amount of the bills was sufficient to cover all demands. An ambiguous expression is cured by verdict, and must afterwards be taken in such a sense as will support the verdict; *Avery v. Hoole* (a); *Lord Huntingtower v. Gardiner* (b); *Fletcher v. Pogson* (c); *Hobson v. Middleton* (d); *France v. White* (e).

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Chilton and Welsby contra. It does not appear by the plea that the bills were negotiable, or that they were indorsed to the plaintiff, or that they were paid to him. It is consistent with every allegation, that the bills were either overdue when delivered to the plaintiff; or that they were paid before they were delivered to him. In *Kearslake v. Morgan* (f), the plea shewed an indorsement of a negotiable security, and the plaintiff acquired a right against a third party. In *Richardson v. Rickman*, which is cited in *Kearslake v. Morgan* (g), Lord Mansfield relies upon the circumstances of the bill being negotiable, and accepted by the party. *Griffith v. Owen* (h), *Ashton v. Freestun* (i), and *Galloway v. Jackson* (k) are authorities to shew that this plea is bad. The word "sufficient" is not only ambiguous, but insensible; and, therefore, the defect is not cured by the verdict.

Cur. adv. vult.

Afterwards (l),

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| (a) Cowp. 825. | (f) 5 T. R. 513. |
| (b) 1 B. & C. 297; See S. C. | (g) Ib. 517. |
| 2 D. & R. 450. | (h) <i>Ante</i> , p. 190; See S. C. 13 |
| (c) 3 B. & C. 192; See S. C. | M. & W. 58. |
| 5 D. & R. 1. | (i) 2 Scott, N. R. 273; See S. |
| (d) 6 B. & C. 295; See S. C. | C. 2 M. & G. 1. |
| 9 D. & R. 249. | (k) 3 Scott, N. R. 753; See S. |
| (e) 1 M. & G. 731; See S. C. | C. 3 M. & G. 960. |
| 1 Scott, N. R. 604. | (l) In Hilary Vacation. |

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ALDERSON, B., delivered the judgment of the Court.— In this case Mr. *Chilton* moved to enter up judgment non obstante veredicto, on the ground that the plea was bad. The plea stated that the defendant had delivered to the plaintiff certain bills of exchange, amounting to more than the sum of 100*l.*), which was the amount of the bill of exchange for which the action was brought), and also amounting to a large and sufficient sum; for and on account of, among other things, the sum of money mentioned in the bill of exchange in question. Now the rule which is laid down in *Kearslake v. Morgan* (*b*), and which has been confirmed by modern cases in this Court, (namely, that the delivery of bills of exchange for and on account of a promissory note, or of any other sum of money in the declaration mentioned, is a conditional payment,) is to be taken as confined to negotiable instruments alone; and it must appear, on the face of the plea, that the plaintiff took an interest in the negotiable instrument. Now all that appears on the face of this plea is, that the defendant delivered these bills of exchange, which are not stated to be negotiable, for and on account of the debt in the declaration. There is, therefore, no averment in the plea which calls upon the defendant to shew that these were negotiable bills; and in the absence of that averment, or of any averment, which makes it at all necessary for the defendant, in case any issue had been taken upon it, to have proved that fact; the plea is bad in substance: and though we agree in the view which Mr. *Williams* took in his argument, that to every averment in a plea which contains ambiguous words, a sense must be given, which will make the plea good rather than bad; yet, in this case, there are no words tending to show that these bills of exchange were negotiable, and, consequently, there are no words to which that principle can apply. We say nothing upon the question, whether or not the other words in the plea on which Mr. *Williams* relied, would have done; but we entertain grave doubts whether the averment

that the bills of exchange amounted to a large and sufficient sum, would not be enough to have made the plea valid by treating the sufficiency as adequate to discharge, not merely the debt in the declaration mentioned, but also "the other things" for or on account of which they are alleged in the plea to have been given. Upon the whole, we think that the plea is bad in substance, and that the rule for entering the judgment for the plaintiff on the first issue, non obstante veredicto, must be made absolute.

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Rule absolute.

COURT OF QUEEN'S BENCH.

Hilary Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

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COX v. BALNE.

Where an under-sheriff, who was acting as attorney for certain creditors of the defendant, informed them of a writ of fieri facias at the suit of the plaintiff, having been placed in his hands to execute, by which means the issuing of a fiat in bankruptcy against the defendant was accelerated, and the plaintiff's execution thereby defeated; the Court refused to grant the sheriff relief under the Interpleader Act.

THIS was an application on behalf of the sheriff of Dorsetshire for an interpleader rule, under the following circumstances. It appeared that a writ of fieri facias on a judgment entered up by the plaintiff against the above defendant on a warrant of attorney, was delivered to the under-sheriff of Dorsetshire on the 5th of December, 1844, and on the same day the goods of the defendant were seized in execution. On the following day, the under-sheriff received a notice of a claim to the goods in question from certain parties, claiming under a deed of settlement. On the 7th of December, a fiat in bankruptcy issued against the defendant. An interpleader summons had been obtained on behalf of the sheriff, on the 9th of December, which was heard before Mr. Justice *Wightman*, at Chambers, and discharged. That application was opposed on behalf of the plaintiff, on an affidavit of the plaintiff's attorney, stating that he was informed, and believed that at the time of the issuing of the writ of fieri facias at the suit of the plaintiff, the under-sheriff was acting as agent to the petitioning creditor under the fiat against the defendant; and that after the writ had reached his hands, and before the fiat was issued, the under-sheriff had made a communication to the parties prosecuting the fiat, by which the issuing of such fiat had been accelerated, and the plaintiff's execution frustrated. The affidavit also

stated that on delivering the writ of fieri facias to the under-sheriff on the 5th December, he looked at the amount indorsed, and then observed, that it would be of no use to execute the writ, as a docket would be immediately struck against the defendant; that the deponent thereupon requested him to execute a bill of sale to the execution creditor; but that he refused to do so, notwithstanding there was ample time for that purpose. The affidavit of the under-sheriff in answer, denied collusion; and stated that before the writ of fi. fa. in question reached his hands, he had been concerned for certain creditors of the defendant; but it did not negative the fact, that he had made a communication, by which the issuing of the fiat had been accelerated.

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Barstow now applied, on behalf of the sheriff, for an interpleader rule. He submitted, that under these circumstances, the under-sheriff was justified in the course he had pursued. The act 6 & 7 Vict. c. 73, having repealed the 22 Geo. 2, c. 46, by the 14th section of which act it was provided, that no under-sheriff or his deputy, should act as a solicitor, attorney, or agent, or set out any process at any place where he should execute the office of under-sheriff, under a penalty of 50*l.*; he was bound, both with a view to the interests of those clients, for whom he had been previously concerned, and also for the protection of the general creditors, when a fiat was about to issue, to make the communication in question. He was the more justified in taking this course, from the fact of the judgment, on which the execution had issued, being on a warrant of attorney, a circumstance in itself suspicious. This proceeding is very different in its nature from the collusive acts of the parties, in cases in which similar applications have been refused. The under-sheriff was here professionally concerned for creditors of the defendant, as in the present state of the law he had a right to be, before the plaintiff's writ reached him; and a duty was thus cast upon him before he received the

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writ, which he was afterwards equally bound to discharge. The case is altogether different from that of *Dudden v. Long* (a), which at first sight might appear an authority against the present application. There the Court discharged a rule nisi for an interpleader rule, because the under-sheriff's partner was solicitor to a fiat under which the defendant had been declared a bankrupt. But the ground of that decision was, that the under-sheriff, who for that purpose was identified with his partner, had assumed a character which disentitled him to the relief he sought, subsequently to the delivery of the writ of execution into his hands. But here the under-sheriff has been concerned for the defendant's creditors, before the writ of execution issued.

WILLIAMS, J.—There is no doubt that the facts in the case of *Dudden v. Long*, which has been referred to, were much stronger than in the present instance; but that case is important, as recognizing the principle on which an under-sheriff ought to act; namely, that of entire impartiality between the contending parties. Though it is, no doubt, competent to the under-sheriff, under the statute referred to, to act as an attorney during his under-shrievalty; still he is not at liberty to take any steps which may have the effect of defeating a writ of execution which has been delivered into his hands. Mr. *Barstow* admitted, and indeed it must be assumed, that the under-sheriff did, in fact, make the communication complained of; and in referring to the case of *Dudden v. Long*, which he very properly brought to my notice, attempted to distinguish it from the present. I think he has not done so successfully. The under-sheriff had no right to make a communication, of which the effect might be to hasten, more or less, the issuing of the fiat, and he ought to have refrained from giving assistance to either party. The rule on which the Courts act in cases of

(a) 1 Bing. N. C. 299; See S. C. 1 Scott, 281; 3 Dowl. 139.

laches, shews how strictly they hold the sheriff to his duty before they consent to interpose in the manner now prayed for; and the reason on which that rule is founded, applies much more strongly to proceedings which may essentially affect the rights of parties who come to the sheriff for assistance. While the execution is pending, the under-sheriff's mouth ought to be closed: that has not been the case here. The sheriff may resort to any other remedy which may be open to him, but he has not entitled himself to the one he now seeks.

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Rule refused.

Barstow then applied for and obtained four days' time for the sheriff to make his return to the writ.

HENRY SPARDING and HENRY MORTIMER HUMMEL v.
ROBERT FULKE GREVILLE, Esq., commonly called The
Honourable ROBERT FULKE GREVILLE.

THE plaintiffs being unable to serve the defendant with a writ of summons, proceeded by the usual steps to judgment of outlawry against him. The defendant thereupon brought a writ of error coram nobis, to reverse that judgment; and the error assigned was, that the defendant, at the time of the judgment being given, was residing in parts beyond the seas. The plaintiffs now sought to set aside the allowance of the writ of error and the subsequent assignment of grounds of error, on the ground of irregularity; the names of the parties to the action in the original writ of summons being, "Henry Sparding and Henry Mortimer Hummel," against "Robert Fulke Greville, Esq., commonly called The Honourable Robert Fulke Greville;" whilst the notice of allowance of the writ of error was headed, "Sparding and

Where the notice of allowance of a writ of error and assignment of errors were not entitled in the original cause of "H. S. and H. M. H. against R. F. G., Esq., commonly called The Hon. R.F.G.;" but in "S. and Another against The Hon. R.F.G.;" Held, on motion to set aside the allowance and assignment of errors for irregularity, that the variance was immaterial.

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Another *v.* The Honourable R. F. Greville;" and the assignment of errors was headed, "Henry Sparding and Another against The Honourable Robert Fulke Greville." A rule having accordingly been obtained,

Martin shewed cause (with whom was *Beavan*). The notice of the allowance of the writ of error and the assignment of errors, sufficiently appear to be in the original cause. It is the practice, where there are several plaintiffs or defendants, in entitling the various proceedings in the cause, to entitle them as A. B. "and others," against C. D.; or A. B. "and another" against C. D. "and others," as the facts warrant. And that is sufficient; for the only object of entitling the proceedings, is to prevent the opposite party from mistaking to what suit they relate. It cannot, therefore, be any valid objection to the proceedings here, that they have been entitled, "Sparding and Another," instead of containing both the plaintiffs' names at length. And, indeed, if it were, it would apply equally to the present rule, which is similarly entitled. Then as to the defendant's name, it is of no consequence that there is attached to it a prefix of courtesy, which the plaintiffs themselves have given him in the writ of summons. It is sufficient if he be described by the name by which he is commonly known; and the plaintiffs themselves have stated that to be, "The Honourable Robert Fulke Greville." All that is necessary is, that the writ of error should so describe the parties to the record, that it may be clear to all convenient certainty, that the record to be brought before the Court is the one upon which the parties intend that the judgment of the Court below should be reviewed; *Hunt v. Lawson* (a). There is, however, a further answer to this motion; that the affidavit on which it is moved is not properly entitled. It is entitled in the original cause; whereas the writ of error having issued out of Chancery,

(a) 1 Ld. Raym. 347.

and which till quashed must be reckoned valid; it ought to have been entitled, in the proceedings in error; *Gandell v. Rogier* (a). This Court, moreover, has no power to set aside the allowance of a writ of error. The application should be to the Court of Chancery. It is true, that the contrary was decided in *Holmes v. Newlands* (b); but the authority of that case has since been doubted; and the earlier decisions of *Jones v. De Lisle* (c), and *Boreman v. Brown* (d), are, it is submitted, the safer authorities.

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F. V. Lee, in support of the rule. It is apprehended that the rule is, that the party bringing his writ of error should correctly describe the parties between whom the action is brought, upon which it is sought to have the judgment of the Court of error; and it is submitted, that the proper description of the defendant in this case was his real name together with his title of courtesy. If, however, one or the other only were to be given, it should have been his real name, and not his name of courtesy. The names of the parties also should have been set forth correctly, and not with abbreviations. The case of *Gandell v. Rogier* is distinguishable. There the application was not to set aside the proceedings in error; but to set aside certain writs of scire facias which had been issued after the writ of error sued out. There were no objections there as to the validity of the proceedings in error. The case of *Holmes v. Newlands* is precisely in point. As to the case of *Jones v. De Lisle* it is submitted, that all that that case decides is, that the objection that a writ of error has been improperly obtained, cannot be raised on a motion to set aside the allowance of the writ of error; but that the application should be to the Court of Chancery.

Cur. adv. vult.

(a) 4 B. & C. 862; See S. C. 7 D. & R. 259.

(b) 2 Dowl. 716, N. S.

(c) 10 Moore, 617; See S. C. 3 Bing. 125.

(d) 1 Dowl. 281, N. S.

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WILLIAMS, J.—This was a rule to shew cause why the allowance of the writ of error in this cause, and the subsequent assignment of errors, should not be set aside for irregularity. The alleged irregularity is, that the title of the cause in the notice of allowance of the writ of error and in the assignment of errors, is not the same as in the original action ;—that the notice of allowance of the writ of error and the assignment of errors, purport to be in a cause of “Sparding and Another v. The Honourable Robert Fulke Greville ;” whereas the original action was entitled, “Henry Sparding and Henry Mortimer Hummel,” against “Robert Fulke Greville, Esq., commonly called The Honourable Robert Fulke Greville.” Now it is not sought to impugn the writ of error itself ; and I must, therefore, assume that that document is properly entitled in the original action. And the question therefore simply is, whether there has been any thing erroneous in the subsequent process ; and I am of opinion that there has not. Although it is true, the full title of the cause has not been given ; it has been set out sufficiently at length, for the other party and his attorney to be fully aware to what cause these proceedings had reference. It is the usual mode, where there are several plaintiffs or defendants, to describe them shortly in entitling proceedings in the cause, as A. B. or C. D., “and others.” Here the defendant has been described by the name by which he was “commonly called,” and by which he was also designated in the original action. The design of the notice of the allowance of the writ of error, is to inform the other party of a step being taken in the cause ; and I think the information here was sufficiently clear and certain, to make the plaintiffs understand in what cause it was given. It appears to me, therefore, that there was here a perfectly intelligible description given ; and that there is no ground for this rule to set aside these proceedings.

Rule discharged.

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In re BATEMAN.

(In the full Court).

THIS was an application for a rule to direct the examiners of attorneys to examine a gentleman of the name of Bateman, with a view to his being admitted as an attorney.

It appeared that in September 1826, the applicant had been articulated to an attorney of the name of Hughes, with whom he served for a period of three years; at the end of which time, the articles were determined by mutual consent. In October, 1829, the applicant entered, as a student, at Christ's College, Cambridge, and continued there till January, 1833, when he took his bachelor's degree. From that time, for three years and upwards, he studied with a conveyancer; having, in 1831, been admitted as a student of the Middle Temple for the purpose of being called to the Bar. In May, 1835, he was accordingly called to the Bar, and practised as a conveyancer from 1836, to the end of the year 1842, when he wholly ceased to practise as a barrister. On the 22nd of January, 1843, he entered into fresh articles with an attorney of the name of Brabant for a period of five years, with a proviso, that if at any time previously to the expiration of that term, he should, by virtue of his three years' service with Mr. Hughes, be entitled to be admitted as an attorney, he should be at liberty to put an end to his articles. He had served under these articles until the present time; and had not been engaged, during that time, or since, in any other practice, business, or profession whatever. On the 17th of January, 1845, he was disbarred, on his own petition, by the Society of the Middle Temple; and his affidavit stated that his omission to take this step at an earlier period, arose solely from inadvertence, and not from design; and that he was unaware of any necessity for

A barrister cannot serve as an articulated clerk, for the purpose of being admitted an attorney, without first being disbarred.

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doing so, in order to make his service under his last articles, a valid service.

Sir *F. Thesiger* (Solicitor General) and *F. Robinson*, on behalf of the examiners of attorneys, shewed cause in the first instance. This is an application to admit a service by a barrister under articles of clerkship to be a good service. It is an application to the discretionary power of this Court, and it is submitted that in the exercise of that discretion, this Court will refuse to grant it. By a rule of all the Inns of Court, no person can keep terms, for the purpose of being called to the Bar, whilst acting as an attorney or as an attorney's clerk. And on the same principle, it is submitted, no person should be allowed to serve under articles whilst actually a barrister, and entitled to practise as such. It is true that, in the present instance, the applicant has not practised as a barrister whilst serving his articles, but the power of doing so might open the door to great abuses. It would be giving the party also an unfair professional advantage in thus allowing him to qualify for either branch of the profession. The case of *Ex parte Cole (a)*, shows that a barrister must be disbarred before he can be admitted as an attorney. [A case of *Ex parte Warner*, reported in the sixth volume of the *Jurist*, was also referred to].

Knowles, in support of the application. There is no statutory enactment, nor any rule of Court, preventing a service under articles from being a good service, because the party, if a barrister, has not been previously disbarred. There is no doubt he cannot be admitted as an attorney, without that step having been previously taken. It may be very proper that he should not be admitted a student of an inn of Court whilst on the roll of attorneys, or serving in the capacity of attorney's clerk; but there can be no

(a) 1 Dougl. 114.

reason why the simple fact of his inadvertently having suffered his name to remain on the books of the Middle Temple in a higher branch of the profession, should prevent his service from being declared valid. He never has practised during the time he was serving, and he is now disbarred. Therefore the evils, which it is said might arise in such cases, could not happen in the present instance. The Court have never held that the mere fact of the party's having previously filled an office, in any way disqualified him from being admitted as an attorney; unless it was of such a nature as to create a presumption of his time having been otherwise taken up than in the duties of his profession; *In re Taylor* (a). Here his pursuits have been eminently of a kind to qualify him for his profession as an attorney. In the case of *Ex parte Cole* (b), which has been referred to, the party had been an attorney, and struck off the roll, and called to the Bar. He then applied to be re-admitted on the roll, and the Court said that he ought to be first disbarred. Here the applicant has been disbarred; and the question is, whether the Court is to go further than in that case, and say he must be disbarred previous to his service. He cited also *Fletcher's case* (c), and *Carter's case* (d).

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LORD DENMAN, C. J.—I think that the examiners have acted with great propriety in bringing forward this matter, as it is one of great importance to the profession. The grounds upon which they have objected to examine Mr. Bateman, appear to me to be of sufficient importance to justify the objection; and it is no answer to say that the applicant is not expressly or directly disqualified by statute. The application is made to the discretion which the Court exercises over subjects of this nature; and though no imputation is made upon the applicant as to his personal

(a) 4 B. & C. 341; See S. C.
 6 D. & R. 428.

(b) 1 Dougl. 114.

(c) 2 W. BL 734.

(d) Id. 957.

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conduct, he has yet placed himself in a position which throws upon the Court the necessity of inquiring whether such a connection as that which has occurred in the present case, ought to be allowed to exist. Our power is derived, in such a case, not from the statute, but from the power of admission, and, consequently, of rejection, which this Court undoubtedly possesses. It appears to me, that the danger of sanctioning such a combination of offices is great and manifest, and however much we may regret the loss and inconvenience to which our determination may subject this gentleman, it is our duty to see that no connection should exist between the two branches of the profession which would be likely to lead to any malversation in either. I think that the observations which have been made by the Solicitor General, regarding the abuse which might arise from a person being a barrister at the same time that he is serving under articles of clerkship to an attorney, are entitled to the greatest weight; such abuses are obvious and considerable. And, further, it is clear, that a person who has been placed in such a position as the applicant, and who, at the end of the service, may wish to continue at the Bar, would acquire, by his preceding position, the most unfair and improper advantages. The present case does not at all resemble those in which the Court has granted indulgence to parties who were obstructed by technical difficulties, arising from the loss of documents, the irregularity of stamps, or other defects of a similar nature. The case which approaches the nearest to the present, is that of *Ex parte Cole (a)*, and that case seems to afford a strong argument, à fortiori, against the present application; for if a barrister ought not to become an attorney whilst he continues a barrister, with much less propriety can he become an attorney's clerk. Upon the whole circumstances of the case, I think we should be acting wrong if we allowed any doubt for one moment to exist upon the question, whether

(a) 1 Dougl. 114.

a person who, whilst he is a barrister, has served as a clerk under articles to an attorney, will be afterwards allowed to avail himself of that service for the purpose of being admitted as an attorney. The present application must, therefore, be refused.

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PATTESON, J., and COLERIDGE, J., concurred.

Rule refused.

REGINA v. The Rev. W. B. WROTH and the Rev. J. RICH,
Clerks.

ARCHBOLD had obtained a rule, calling on the Rev. William Bruton Wroth, clerk, and the Rev. John Rich, clerk, two of the keepers of the peace and justices in and for the county of Buckingham, to shew cause, why a writ of certiorari should not issue to remove into this Court a certain order of bastardy, under their hands and seals, in order that the same might be quashed.

The order was as follows :—

“ Bucks to wit. At a petty session of her Majesty’s justices of the peace for the county of Buckingham, holden in and for the Ivinghoe division of the three hundreds of Cottesloe, in the county of Buckingham, at the town-hall, in Ivinghoe, in the said division and county, on the 4th day of November, 1844, before us, the Rev. William Bruton Wroth, clerk, and the Rev. John Rich, clerk, two of her Majesty’s justices of the peace for the said county.

“ Whereas one Mary Stilton, single woman, residing at the parish of Wingrove, within this division and county, did, on the 7th day of October, 1844, having been delivered of a male bastard child, within twelve calendar months prior thereto, make application to William Jenney, Esq., one of her Majesty’s justices of the peace usually acting for this division and county, for a summons to be

An order in bastardy, under the 7 & 8 Vict. c. 101, s. 3, did not state that the evidence, which the mother had produced, was given upon oath, or that the testimony in corroboration of a material particular had been taken upon oath :
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served upon one Thurston Earthrowl, of No. 13, Elizabeth Terrace, Liverpool Road, Islington, in the county of Middlesex, carpenter and joiner, whom she alleged to be the father of the said child, and the said justice thereupon issued his summons to the said Thurston Earthrowl, to appear at a petty session to be holden on this day for this division and county, to answer her complaint touching the premises. And whereas the said Thurston Earthrowl, having been duly served with the said summons within forty days from the present time, and being now present, and the said Mary Stilton, having now applied to us the justices in petty sessions assembled, for an order upon the said Thurston Earthrowl, according to the form of the statute in such case made and provided: and it being now proved to us, in the presence and hearing of the said Thurston Earthrowl, that the said child was within six calendar months, before the passing of an act, passed in the eighth year of the reign of her present Majesty, intituled 'An Act for the further Amendment of the Laws relating to the Poor in England,' that is to say, on the 31st day of March, 1844, born a bastard of the body of the said Mary Stilton: and we having in the presence and hearing of the said Thurston Earthrowl, heard the evidence of such woman upon oath, and such other evidence as she hath produced, and having also heard the said Thurston Earthrowl by his attorney, and the evidence of the said Mary Stilton, the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby adjudge the said Thurston Earthrowl to be the putative father of the said bastard child: and having regard to all the circumstances of this case, we do now hereby order that the said Thurston Earthrowl do pay unto the said Mary Stilton, the mother of the said bastard child, so long as she shall live and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such child under the provisions of the said

statute the sum of two shillings per week, from the said 7th day of October last, being the day upon which such application was made, until the said child shall attain the age of thirteen years, or shall die, or the said Mary Stilton shall marry.

“ And we do hereby further order the said Thurston Earthrowl to pay to the said Mary Stilton, the sum of 2*l.* 1*s.* 6*d.*, being the costs incurred in obtaining this order, and 10*s.* for the midwife.

“ Given under our hands and seals at the session aforesaid.

“ JOHN RICH.

“ W. B. WROTH.”

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The following objections, amongst others, were stated to the order:—1st, That it did not shew that the application for a summons was made to a justice of the peace for the county; 2dly, Nor that it was made to a justice of the peace acting for the division, or city, or borough, where the mother resided; but only that he was “usually acting;” 3rdly, Nor that the petty sessions were held for the petty sessional division, &c., in which the justice issuing the summons “usually acts;” 4thly, That in reciting the application for the summons, it did not state that the birth of the bastard child was within six calendar months before the passing of the act; 5thly, Nor any date of the child’s birth; 6thly, That it recited merely an application for a summons, and not an application that evidence should be heard; 7thly, That it did not shew what evidence the mother produced; 8thly, Nor that it was taken on oath; 9thly, Nor that the corroborative testimony in some material particular was on oath.

Keane shewed cause. With respect to the objection (a), that the evidence is not stated to be upon oath, the act

(a) The argument on the other points is omitted, as the decision turned upon this point alone.

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does not require it in terms. The act says, the justices "shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices, they may adjudge" (a), &c. To state proceedings in strict compliance with the very words of the act must be sufficient. If the words "evidence" and "testimony" in this act, import that they are to be taken on oath; then they also mean in this order that they were so taken.

[*Archbold* referred to *Regina v. Lewis and Others* (b), and *In re Gray and Another* (c); as shewing that although the statute, upon which those cases were decided, was silent as to the evidence being taken on oath, it yet was held necessary, that it should appear that the proceedings under it had been so taken. He also referred to *Paley on Convictions*, p. 42, 3rd ed.]

Keane. In those cases, the act (4 Geo. 4, c. 34) requires the complaint to be made upon oath, and the fair and ordinary inference from the language of the act is, that the hearing should also be upon oath.

Archbold, contra, was not called upon.

WIGHTMAN, J.—I think I must decide, on the authority of the cases which have been cited, that this order is insufficient for not stating that the evidence upon which it was made was given upon oath. The cases, which Mr. *Archbold* has referred to, seem to me to be in point. The rule will therefore be absolute.

Rule absolute (d).

(a) 7 & 8 Vict. c. 101, s. 3.

(b) *Ante*, vol. 1, p. 822.

(c) Since reported, *ante*, p. 539.

(d) See the 8 Vict. c. 10.

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HENNING v. ACKERMAN.

IN this case, a verdict had passed for the defendant, and a rule for a new trial had been obtained, on the ground that the verdict was against evidence. The cause had been tried before an under-sheriff, under a writ of trial, and the rule had been granted on a verified copy of his notes.

Where a new trial is moved for as against evidence, in a case which has been tried before the under-sheriff, under the 3 & 4 Wm. 4, c. 42, s. 17, and where no counsel were present at the trial, it is not necessary that there should be an affidavit stating the ground of the motion.

Edwards, F., shewed cause, and took the preliminary objection that the rule must be discharged, on the ground that the resolution of the Judges respecting motions for new trials, in cases before sheriffs and Judges of inferior Courts, had not been complied with. That resolution was in the following terms (a): "That upon all motions respecting causes tried before sheriffs or Judges of inferior Courts of record pursuant to the stat. 3 & 4 Wm. 4, c. 42, ss. 17, 18, the party making the application to the Court above must produce an examined copy of the notes of the sheriff or his deputy, or of the Judge who tried the cause, together with an affidavit verifying such to be a true copy; and also, in cases where no counsel has been retained to conduct the cause or defence in the Court below, an affidavit setting forth the cause or nature of the application, &c." In this case, no counsel had been engaged, and yet there was no affidavit of the cause or nature of the application. Considerable inconvenience might arise, if this resolution were not to be strictly adhered to.

Cooper, contra. No inconvenience could arise, where, as in the present case, the rule is moved for as against evidence. What information would it give the other party, to swear an affidavit that the nature of the application is, that the verdict is against evidence?

(a) 4 M. & Scott, 484.

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WILLIAMS, J.—If the party moving for the rule, intended to rely on any other ground than that the verdict is against evidence ; as that the parties were taken by surprise, or that the evidence was improperly received, there might be some weight in the objection. But as the only ground for the present application is, that the verdict is against the evidence, I cannot think that any affidavit in such a case is required, or that any useful information could be conveyed by it to the other side. This objection, therefore, cannot be supported.

Edwards, F., then shewed cause against the rule.

Cooper, in support of the rule.

Rule discharged.

KING v. TRESS.

(*In the full Court*).

Where a cause was set down in the list of undefended causes for trial in the third sittings in Term, and on the defendant's statement that it was a defended cause, was postponed till the sittings after Term ; and the plaintiff did not re-seal the record previous to those sittings, although he did so before the day on which the cause actually came on for trial ; the Court set aside the verdict which he obtained, for irregularity.

THE above cause was set down for trial, in the list of undefended causes, for the third Sittings in Michaelmas Term, 1844. Upon its being then called on, the counsel for the defendant stated that it was a defended cause. Upon which, it stood over till the first Sittings after Term, with judgment as of the Term. On the first day of those Sittings, the cause being in the paper, the counsel for the defendant applied to put off the trial, on the ground of the absence of some material witnesses. The plaintiff opposed this application. The associate, however, suggested to the plaintiff's counsel, that he had better not urge the cause on

as the record had not been re-sealed. The cause accordingly kept its place in the list. On its being called on, in the ordinary course, on the third day of the sittings, the plaintiff having in the meanwhile re-sealed the record, and the defendant not appearing, a verdict was taken for the plaintiff for the amount claimed.

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Keane had obtained a rule to shew cause why the above verdict should not be set aside for irregularity with costs.

Pashley shewed cause. This is a purely technical objection, and therefore the Court will not aid it by construction. The rule of Easter Term, 7 Geo. 1, requires all records to be sealed "on or before" the respective days for which the trials are appointed. A subsequent rule of Easter Term, 33 Geo. 3, orders that records which stand over from one sitting to another, shall be re-sealed "previous" to the sittings of the Court to which they stand over. The question is, whether these rules have not been substantially complied with, by the record of this cause having been re-sealed previous to the sitting of the Court on the day upon which it was called on for trial. By Reg. Gen., Hil. Term, 4 Wm. 4, r. 18, it is expressly ordered, that it shall not be necessary to re-pass a record which shall have been once passed; and power is given to the Judge, on an ex parte application, to amend the day of the teste and return of the distringas or the habeas corpora. But where cause has been made a remanet, it has been held that it is not necessary to make the amendment; *Wells v. Day* (a). In that case, it is true, the record had been re-sealed; but it does not appear when the re-sealing took place. [*Cole-ridge, J.*—The Court, in that case, no doubt presumed that it had been re-sealed within the proper time. I have refused to try causes where the record has not been re-sealed.

(a) 8 A. & E. 941.

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His Lordship referred to *Walker v. Massey* (a)]. It is submitted that the sittings of the Court must be taken to mean the sitting of the Court on the day on which the cause is called on for trial. The sittings of the Court is not a term known to the law, as the "sitting" of Parliament. In the 24 Geo. 2, c. 18, s. 5, which extends the time of trying causes after Term to the period of fourteen days after the end of any Term respectively, there is no mention of any particular day or sittings at which they are to be tried. That section gives the power to the Chief Justices and the Chief Baron "at any time or times within the space of fourteen days after the end of any term respectively, to try all such issues," &c. [Lord Denman, C. J.—Might it not as well be argued that by the "sittings of the Court," the rule refers to the individual sitting to try the particular case? Coleridge, J.—If the cause were in the paper for trial on one day, could it be contended that it would require re-sealing because it was not tried till the next?]

Keane, in support of the rule, referred to *Walker v. Massey*, and *Cook v. Smith* (b).

PER CURIAM.

Rule absolute, without costs.

(a) 1 Carr. & M. 366.

(b) 1 Dowl. 861, N. S.



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SCHLESINGER v. FLERSHEIM.

R. ALLEN applied for an attachment against the above named defendant, under the following circumstances. It appeared that the above action, which was for a libel, was commenced, and a declaration delivered, on the 31st October, 1844, and a notice of trial given for the 16th of November, when the cause was made a remanet, and stood over for the sittings after the present Term. The defendant, it was alleged, had been guilty of an attempt to persuade a witness, of the name of Rose, not to give evidence at the trial. The attempt was contained in the following letters, which were set out in the affidavit in support of the motion.

The Court refused to grant an attachment against the defendant for an attempt to persuade a material witness for the plaintiff not to give evidence at the trial; it not being shewn that the witness was prevented from being subpoenaed by means of the defendant's interference.

“Birmingham, 12th November, 1844.

To G. Rose, Esq., Beybrook Hall, Woodstock, Oxon.

Dear Sir,

Your house in Manchester has favoured me with your address. My object in writing to you is to inform you, that I am threatened with proceedings for libel by Joseph Schlesinger, on account of a letter which I wrote to you on the 4th of September, and in which I stated nothing more than the truth, and what I am fully able to prove. * * * I therefore beg to ask of you, that you will consider my letter of the 4th of September as a private communication; and I quite depend upon it, as what is due from one respectable man to another, that you will give neither countenance nor assistance to the proceedings of * * *. Perhaps you will be able to get back the said letter, should it be out of your hands; but even if you should not succeed in this, my legal adviser informs me, that unless you come forward and render your assistance by proving the receipt, &c. of the letter, the charge

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will fall to the ground. Your brother at Manchester, on whom my traveller called and explained the whole of my connexion with Schlesinger, kindly offered to write to you on the subject. * * *

Your's, &c.,

THEODORE FLERSHEIM."

" Birmingham, 18th November, 1844.

To F. Rose, Esq., 7, Corn Market Street, Oxford.

Dear Sir,

I am much obliged for your favour of the 16th inst. With regard to the money that you have paid to Schlesinger, the question is, who is to lose it, your house or myself; and in consideration of the courteous way in which you have met me in this instance, I will at once waive all further claims against you, and consider your small account as settled. On the other hand, I beg to request that you will get back and return to me the letter in question, which was a private communication addressed to you, and as such you have a perfect right to ask for its restitution: it cannot be withheld, if you ask for it earnestly. Trusting to your best endeavours to obtain this * * *

Your's, &c.,

THEODORE FLERSHEIM."

" Birmingham, 23rd November, 1844.

To George Rose, Esq., 7, Corn Market Street, Oxford.

Dear Sir,

I have been favoured by a communication from your brother Frederick, dated 22nd inst., and trust you will be able to get back the letter. This will be much more satisfactory, and put a stop to all further annoyance. In the meantime, would you be so kind as to let me know how the letter came into Schlesinger's possession; whether you handed it over to him at Manchester, or if it was forwarded to him by post, and whether accompanied by a letter in

your handwriting or not. I shall feel much obliged if you will give me these particulars. * * *

Your's, &c.,

THEODORE FLERSHEIM."

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"London, 6th December, 1844.

Messrs. J. & G. Rose, Manchester.

Dear Sirs,

From what I hear from my solicitor, it appears that Schlesinger means to go on with his action of libel against me, and if so, the case will probably be tried on Monday next, the 9th inst. Will you be kind enough to inform me by return of post, to my address, Birmingham, whether one of your firm has been subpoenaed to appear as a witness, and whether it is your Mr. George, or another brother. In that case, will you oblige me to give me the address of the gentleman subpoenaed, that I may be able to have, *immediately* before the trial comes on, some verbal communication with him? * * * I am sorry, indeed, that the letters could not be got back, and the annoyance stopped by that means; but under the circumstances, I rely upon your promised attention to my request. * * *

Your's, &c.,

THEODORE FLERSHEIM."

It is laid down in 1 *Hawk. Pleas of the Crown*, bk. 1, ch. 21, sec. 15, that "all who endeavour to stifle the truth, and prevent the due execution of justice, are highly punishable," and "also all those who dissuade, or but endeavour to dissuade a witness from giving evidence against a person indicted," &c. And the case of *The King v. Stevenson and Others* (a), shews that an indictment would lie against parties who should join in persuading a witness to refrain from giving evidence on a complaint exhibited before the commissioners of excise. In *Clements v. Wil-*

(a) 2 East, 362; See also *Rez v. Lawley*, 2 Str. 904.

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liams (a), the defendant kept a witness material to the plaintiff's case out of the way, so as to hinder the service of the subpoena; and the Court held that it was clearly an offence against justice, and punishable by attachment. This is also the case of an attempt to obstruct the administration of justice by a party to the record; and in the recent case of *Smith qui tam. v. Bond* (b), *Pollock*, C. B., expresses his opinion, that an attachment will lie against all parties who in any way obstruct, pervert, or defeat the authority of the Court.

WILLIAMS, J.—I think that a criminal case differs essentially from the present one; because there the public is directly interested in the detection and punishment of the criminal; but in a civil case, the public is at most but indirectly interested that the course of justice should be upheld. Now in the case of *Clements v. Williams* (a), which has been cited, the attempt to subpoena the witness had failed through the proceedings complained of. That case is, therefore, distinguishable from the present on that ground. Here, the injury which it is supposed the plaintiff will sustain from this conduct on the part of the defendant, is at present pure matter of speculation. The plaintiff does not shew that he cannot serve the witness with a subpoena, or that the witness, if served, will not appear and produce the letter in question in evidence. It will be time enough when he can shew these facts, to apply to the Court for redress. At present, I do not see that any obstruction of public or private justice has been shewn, to call upon the Court to interfere by attaching the offender.

Rule refused.

(a) 2 Scott, 814.

(b) Since reported, *ante*, p. 460.



1845.

REGINA v. JENNINGS and PEXTON.

PASHLEY moved, on behalf of the churchwardens and overseers of the poor of the township of Sutton upon Derwent, in the East Riding of the county of York, for leave to file a criminal information against Robert Jennings and William Pexton, overseers of the poor of the township of Storthwaite, otherwise Storwood, also in the East Riding of the same county.

It appeared that the last-named township was a township supporting its own poor, and that one Allison, his wife, and family had become chargeable upon it. The affidavit of Allison stated, that in the month of March 1838, he went with his family to reside in the township of Storthwaite. That he had, at various times, received relief from the union, of which Storthwaite township formed a part, as well as from the overseers of the township. That in the month of February 1844, he had been turned out of a cottage which he rented of one Webster, who told him that the parish had urged him to do so, on account of the expense which Allison had been to the parish; and that if he would only go to the parish to which he belonged, and get his settlement put right, he would admit him again as his tenant. That the parish officers then took a cottage for him and his family for a short time; but, ultimately, they were turned out of that also. That an order of removal had been obtained, on the 1st of June 1844, by Jennings and Pexton, for the removal of himself and family to the parish of Sutton upon Derwent; but that no actual removal had taken place; and the order had been, as deponent believed, quashed, on appeal, in July in the same year. That on the 14th of September following, deponent was examined before certain magistrates; and another order of removal to Sutton, as deponent believes, was then made, but never served. That upon applying for relief to Pexton, that officer refused to give him any, advising him that the best thing he could do, was to go over in the night to Sutton,

The Court refused to grant a criminal information against overseers for an alleged attempt to procure a pauper and his family to remove themselves clandestinely to another parish; where the remedy by indictment was open to the parties; and no circumstances were shewn, requiring the prompt interference of the Court.

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and then that parish would be obliged to find him a settlement. That Jennings and Pexton consulted together, and said they would have nothing to do with him. That the inhabitants in the village refused to take him in, saying, that they dared not to do so, as there was such an objection to deponent and his family having a house there. That Padget, a person in the employ of Jennings, had taken them in for a short time; but had refused to let them remain, for fear of incurring his master's displeasure. That being unable to obtain shelter for himself and family, they had been, at last, driven to the parish of Sutton, where his wife's family lived. The affidavits also disclosed various other facts, shewing that Jennings and Paxton had sought to induce the pauper to remove to Sutton.

Under these circumstances, it is submitted, that the Court, seeing that these overseers have neglected their duty in refusing to relieve this pauper, and have, notwithstanding a former order of removal had been decided against them on appeal, used all the means in their power to induce the pauper to attempt, fraudulently, to obtain a settlement in another parish, so as to fix that parish with the burden of his maintenance, and to relieve their own, will grant the present rule for a criminal information against them. [*Williams, J.*—Have you any authority for the Court interfering in this summary manner, where the parties, if liable at all, are liable to an indictment preferred against them in the ordinary course?] In *The King v. Herbert (a)*, the Court granted a criminal information against overseers for procuring a marriage to change a settlement. So in *Rex v. Watson (b)*, *Rex v. Tarrant (c)*. It is laid down in *Nolan on the Poor Laws (d)*, "Overseers may be punished for most breaches of their duty, by information or indictment." If these parties have been acting without improper motives, that may form an answer on shewing cause against this rule; *Rex v. Barratt (e)*.

(a) 2 Ld. Kenyon, 466.

(b) 1 Wils. 41.

(c) 4 Burr. 2106.

(d) Vol. 2, p. 474, 4th ed.

(e) 2 Dougl. 466.

WILLIAMS, J.—The only question which I have to decide is, whether the facts, in this case, are such as imperatively to call on the Court to interfere by granting a criminal information against these persons; or whether the same end cannot be attained by leaving the parties to the ordinary remedy by indictment. I cannot see that there is any sufficient reason shewn for my interfering in the unusual mode suggested, namely, by criminal information. One of the circumstances usually urged on applications of a similar nature, is the necessity for the prompt interference of the Court. No such necessity is shewn to exist in the present case. If even it were shewn that the remedy by information had been of a less expensive character than that by indictment, that might have been a strong argument to induce me to accede to the present motion; but I do not see that that would be so. I must, therefore, decline to grant a rule in this case.

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Rule refused.

DAVIS v. TREVANION.

MARTIN had obtained a rule to set aside, with costs, a judgment signed on a warrant of attorney, and the subsequent proceedings on a writ of scire facias, issued to revive that judgment; on the ground that the warrant of attorney had not been duly attested, in pursuance of stat. 1 & 2 Vict. c. 110, s. 9. The warrant of attorney was given on the 27th of July, 1841. It had been signed by the defendant, whilst abroad, and contained no clause of attestation, as required by the stat. 1 & 2 Vict. c. 110, s. 9. Judgment had been entered up on the 16th of August following. The writ of scire facias was issued in Michael-

A warrant of attorney executed abroad, must be attested by an attorney, in pursuance of 1 & 2 Vict. c. 110, s. 9. An outlaw may claim the protection of the Court to set aside irregular proceedings which have been taken against him; although he cannot put

the law in motion for his benefit, without first reversing his outlawry.

The Court will, therefore, set aside a judgment on a warrant of attorney, and a scire facias to revive that judgment, on the ground that the warrant of attorney has not been duly attested; although the defendant be an outlaw.

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mas Term last. The plaintiff had applied to a Judge at Chambers, for leave to sign judgment on the scire facias, which the defendant had sought to oppose; but the plaintiff objecting that he could not be heard, being an outlaw, the learned Judge referred the parties to the Court; and the present rule was accordingly obtained.

Humfrey shewed cause, on affidavits, stating that the defendant was an outlaw at the suit of another party; that the warrant of attorney had been executed abroad; and that an attorney had attended to witness the execution, at the request of the defendant, although he had not signed his name as a witness. It is submitted, first, that the defendant has no locus standi in Court, except to reverse his outlawry. It is true, that in the case of *Hawkins v. Hall* (a), the Master of the Rolls seems to have held differently; and that decision has been acted on, in this Court, on two occasions in the same case of *Walker v. Thellusson* (b); but these cases are supposed to have gone farther than any prior decisions; and the Court will perhaps hesitate to act on them, opposed as they are to the current of the older authorities. Besides, on the first occasion, in *Walker v. Thellusson*, the application was to discharge the defendant from a personal arrest; here the defendant is not in custody. But should the Court hold this objection to be insufficient, it is submitted, secondly, that this warrant of attorney is perfectly valid, and that the provisions of the 1 & 2 Vict. c. 110, s. 9, do not apply to cases like the present, where the warrant of attorney is signed abroad, and where it may be impossible to procure the presence of a professional man. [*Wightman, J.*—In that case, the Legislature probably intended that the warrant of attorney should not be capable of being enforced here. The words of the act are very general: “no warrant of attorney,” &c., “shall be of any force, unless there shall be present some

(a) 1 Beav. 73.

(b) 1 Dowl. 277 and 578, N. S.

attorney," &c. The evil intended to be remedied by the statute, equally applies to the case of a warrant of attorney executed abroad.] If the statute had been intended to apply to cases where a warrant of attorney is executed abroad, it surely would have provided some other mode of attesting in such cases. [*Wightman*, J.—The same observation would apply to the case of a warrant of attorney executed in Scotland.] If such a construction be put on the words of the statute, then almost all the warrants of attorney executed in our settlements, where the attorneys are not also attorneys of the superior Court here, would be invalid here, and much inconvenience might thence ensue.

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Martin, in support of the rule. The case of *Hawkins v. Hall* (a), was not the only case cited to the Court in *Walker v. Thellusson* (b). The cases of *Aldridge v. Buller* (c), and *Loukes v. Holbeche* (d), were brought under the notice of the Court; and yet the Court decided in that case that an outlaw might appear in Court to claim the protection of the law, and drew the distinction between his appearing with that view, and appearing with the view of taking the benefit of the law, which it is conceded he cannot do. The second decision in *Walker v. Thellusson*, was under circumstances precisely analogous to the present. [He was proceeding to argue the other objection; when he was stopped by the Court.]

WIGHTMAN, J.—I think this rule must be made absolute. The ground of objection to this warrant of attorney is, that there was no attestation by an attorney, on behalf of the defendant, in pursuance of the requisitions of the statute in that behalf. It is, however, contended, on the part of the plaintiff, that this warrant of attorney, having been executed

(a) 1 Beav. 73.

5 Dowl. 733.

(b) 1 Dowl. 277, and 578, N. S.

(d) 4 Bing. 419; See S. C.

(c) 2 M. & W. 412; See S. C.

1 M. & P. 126.

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abroad, the provisions of the statute do not apply. But it appears to me, that the enactments of the statute apply equally to warrants of attorney, wherever executed, if attempted to be enforced here; and it is clear, that the mischief, which the act was intended to prevent, might still exist, if a different construction were to be put upon its language. As far as the argument of inconvenience goes, I do not see that any inconvenience can practically result from such a construction; for there are many parts of England in which it may be equally urged, that it is very inconvenient to get the attendance of an attorney. But it is unnecessary to inquire into these nice questions; for I think the language of the statute is imperative on the subject; and that on that ground this judgment must be set aside.

It is, however, said, that the defendant is an outlaw, and that, as an outlaw, he has no *locus standi* in Court, except for the purpose of reversing his outlawry. Two or three cases have been cited, in which the right of an outlaw to appear to set aside irregular proceedings has been discussed; and, in particular, a case of *Walker v. Thellusson* (a), which was decided by me, and again the same case, before my Brother *Williams*, which is more in point with the present one. Those cases proceeded on the distinction which they recognise and establish, that an outlaw may appear to claim the protection of the law from irregular proceedings against him; although he cannot put the law in motion for his own benefit, without first reversing his outlawry. That distinction was referred to by Mr. Baron *Parke*, in *Aldridge v. Buller* (b); although, under the particular circumstances of that case, it did not become necessary for the Court to act upon it. The present case comes within the principle of the distinction thus established in *Walker v. Thellusson*; and in accordance, therefore, with that case, and the de-

(a) 1 Dowl. 277, and 578, N. S.

(b) 2 M. & W. 412; See S. C. 5 Dowl. 733.

cision of the Master of the Rolls, in *Hawkins v. Hall* (a), I am of opinion that this rule must be made absolute; but, under the circumstances, without costs.

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Rule absolute, without costs.

(a) 1 Beav. 73.

TUNLEY and HODSON v. EVANS.

THIS was an action of debt, to recover the value of work done and materials provided for the defendant, and for the carriage of the goods of the defendant, and for money due on an account stated: to which the defendant had pleaded the general issue. At the trial, which took place in October, at the Sheriff's Court in London, it appeared, on the case for the plaintiffs, that the plaintiffs were carriers by water, and the defendant a manufacturer of earthenware, who was in the habit of sending his goods by the plaintiffs' boats. That the sum for which the action was brought, was a sum of 18*l.* 18*s.*, for the carriage of certain goods consigned by the defendant to his agent, Mr. Floyd: that on the arrival of those goods, the plaintiffs refused to deliver them to Mr. Floyd, unless he would give a guarantee for the amount of the freight; and that Mr. Floyd accordingly gave the following guarantee:

In an action for work and labour by A. and B., who were partners at the time that the cause of action accrued, the defendant put in evidence a letter written by C., who had since the transaction become a partner with B. in the room of A., admitting that the plaintiffs had given credit to another party: *Held* inadmissible, without proof that C. had authority from B. to make the statement.

"To Messrs. Tunley and Hodson,

Gentlemen,—I hold myself responsible for the boat load of bottles from Mr. Evans, of Ilkeston, which arrived at your wharf, May 22d, 1843.

May 25, 1843."

(Signed) CHAS. FLOYD.

That at the time in question, the plaintiffs, Tunley and Hodson, were in partnership; that Hodson had since re-

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tired; and that the plaintiff, Tunley, and one Simpson, were now in partnership. On the part of the defendant, a letter written by Simpson to the defendant was put in, to the following effect:

“London, January 24, 1844.

Mr. Evans,—Sir,

Mr. Floyd informs me, you had arranged with Mr. Tunley to settle your account with him. I beg to say, that Mr. Tunley has said nothing to me on the subject; if he had, it would make no difference, as we shall not look to you for the 18*l.* 18*s.* 0*d.*, for which Mr. Floyd is accountable. To oblige him I have renewed his bill with expenses, 19*l.* 17*s.* 2*d.*, for one month, due February 26th, 1844. Your claims upon us (you say) are 22*l.* 13*s.* 1*d.* After making inquiries, I find there is not less than 15*l.* 17*s.* 2*d.* which we shall not allow. Your's, &c.

JOHN SIMPSON.

P.S.—I shall furnish Mr. Tunley with particulars of your account in a few days.”

The reception of this letter in evidence was objected to by the plaintiffs, on the ground that it could not be evidence against the plaintiffs, Simpson not being a partner at the time, and no authority being shewn to him to write it. The learned commissioner overruled the objection. An invoice was then put in, signed by Simpson, charging Floyd with an account of 18*l.* 18*s.* due to the plaintiffs; and a bill of exchange, dated 13th November, 1843, drawn by plaintiffs on Floyd, and accepted by Floyd, due 16th Jan., 1844. The plaintiffs then proved that the invoice had been made out in Floyd's name, after he had given the above guarantee. The learned commissioners left it to the jury to say, “to whom did the plaintiffs originally look for payment, and to whom was the credit given. *Primâ facie*, the consignor was liable. Did the mode of proceeding here vary the *primâ facie* case? If the plaintiffs held

the defendant liable originally, no subsequent substitution of another would exempt him under his present plea and the issue thereon ; but if not originally liable, the defendant was entitled to the verdict. The jury having returned a verdict for the defendant,

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Lush obtained a rule (a), calling on the defendant to shew cause why the verdict entered for the defendant should not be set aside, and a verdict entered instead for the plaintiffs ; or for a new trial, on the ground of misdirection (b), and that the verdict was against evidence. (c).

Humfrey now shewed cause. It may be conceded that the defendant cannot put his case higher, than by treating the admission of Simpson as the admission of the managing clerk of the plaintiffs. As such, it is submitted, it was properly receivable in evidence. A managing clerk must have authority to make any admissions which would naturally occur in the course of carrying on the business. An admission by him of payment, or of the value or quantity of the goods furnished, would unquestionably be evidence against his employers ; because, payment to him would be sufficient, and because he has the care of conducting the business. So, on the same principle, an admission by him as to the party to whom credit has been given, is receivable ; because, having the management of the business, he has also a discretionary power to whom he will give or refuse credit. Common sense requires, that if parties choose to trust a clerk with the management of their business, they must be bound by the admissions, which in the course of carrying on that business, he makes to third parties. But, it is said, that any admission of this kind cannot affect a bygone transaction, and a partner who had

(a) In Michaelmas Term.

(b) This point was virtually given up on the argument ; as upon production of the sheriff's

notes the alleged misdirection did not appear in his summing up.

(c) This point depended on the success of the first.

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retired from the business before it was made. The answer is, that this is a statement of an existing account; and that an outgoing partner leaves behind him an implied authority to the other partners to manage the business; and if so, that authority must in the end devolve upon the managing clerk. There is this further circumstance here, that the defendant put in evidence a bill given by Floyd to the plaintiffs, and renewed by Tunley and Simpson; thus recognizing, on the part of the firm, the arrangement entered into by Simpson on their behalf.

Lush, in support of the rule. This was not such an admission, as it was within the province of a clerk, although managing the business, to make. Even were it clear that a managing clerk could make an admission, with reference to whom credit was given by him in the course of managing the business; he could not, it is submitted, make an admission as to whom credit had been given, before he entered the business; as in the present case. There may be an implied authority by a partner who retires to the remaining partner, to collect the debts and wind up the general affairs of the concern; but there can be no authority presumed to make admissions destructive of his right to recover. The admission here is not strictly in the necessary conduct of the business; *Garth v. Howard* (a). A recognition of the admission by Tunley might possibly render it binding; *Wood v. Braddick* (b); *Catt v. Howard* (c); but here no evidence of any recognition has been given. The renewal of the bill of Floyd may have been quite independent of any agreement of Simpson's.

Cur. adv. vult.

WIGHTMAN, J.—This was a motion for a new trial, in a case tried at the Sheriff's Court in London, and in which

(a) 1 M. & Scott, 628; See
 S. C. 8 Bing. 451.

(b) 1 Taunt. 104.
 (c) 3 Stark. N. P. 3.

a verdict had passed for the defendant. The grounds upon which the application was made were ; first, that a certain letter, written by a person of the name of Simpson, had been improperly received in evidence ; secondly, that the Judge had misdirected the jury ; and thirdly, that the verdict was against evidence. With respect to the second objection, I do not see upon the Judge's notes any foundation for it. As regards the third ground, it depends upon the validity of the first objection ; for if the letter of Simpson were properly receivable in evidence, it is impossible to say that there was not sufficient evidence to warrant the jury in finding a verdict for the defendant. The case will, therefore, resolve itself into a consideration of the first ground of objection, which I am of opinion must prevail. It appears that the letter in question was written by Simpson, who at the time of writing it was a partner of the plaintiff, Tunley ; but it has been conceded upon the argument, and I think rightly, that the case cannot be put higher than by treating him as the clerk of Tunley, and that the fact of his being a partner may be wholly rejected, as not affecting the present question. Now when the cause of action accrued, Simpson was not the partner of the plaintiffs, nor is there any evidence that he was in any way connected with them ; and the only question is, whether he can bind them by an admission made after his entry into partnership with Tunley, regarding a transaction which took place prior to that time. In order to make a declaration by one party binding on another, it is necessary to shew that the person was authorized, either generally in carrying on the business, or with reference to the particular transaction. In the present instance, however, I do not find any evidence of such authority from Tunley to Simpson, with regard to this particular transaction, or any evidence by which such an implication should necessarily arise from the situation of clerk or partner ; and no case has been cited which would shew that he could bind the plaintiffs, either as clerk or partner, without such proof

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being given. It therefore appears to me, that the letter in question was not properly received in evidence, and the rule for a new trial must consequently be made absolute.

Rule absolute.

DOE dem. SYMONS v. PRICE.

The stat.
 48 Geo. 3,
 c. 123, s. 1,
 applies to a
 defendant in
 custody for
 the costs and
 damages in
 an action of
 ejectment.

GIFFORD moved to discharge the defendant out of custody, under the 48 Geo. 3, c. 123, s. 1.

Barstow shewed cause in the first instance. The question is, the defendant being in custody for the costs and 1*s.* damages in the above action, whether the statute applies to actions of ejectment. In *Doe v. Reynolds (a)*, the Court of Queen's Bench held it did not; and that case was very fully argued. It is true that since then, the Courts of Exchequer and Common Pleas have held, in the cases of *Doe dem. Threlfall v. Ward (b)*, and *Doe dem. Daffey v. Sinclair (c)*, that it does; and in the latter case, it appears the contrary decision of the Court of Queen's Bench was brought before the notice of the Court. It is submitted, however, that the decision of the Queen's Bench is that entitled to most weight: as it is manifest that no damages are sought to be recovered in the action of ejectment, the remedy being by subsequent action of trespass for mesne profits.

WIGHTMAN, J.—The damages given to the plaintiff in ejectment, are for the loss of his term. Whether they are assessed at a shilling, or at 20*l.*, it is the same in principle. The prisoner is entitled to his discharge.

Rule accordingly.

(a) 10 B. & C. 481.

5 Dowl. 290.

(b) 2 M. & W. 65; See S. C.
nom. Doe dem. Threllford v. Ward,

(c) 3 Bing. N. C. 778; See
 S. C. 4 Scott, 477; 5 Dowl. 615.

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In re PHILIP HEWARD.

COOKE, E., applied for a rule, calling on the Commissioners of Excise to shew cause why a mandamus should not issue, directing them to pay over to the official assignee of Philip Heward, a sum of 40*l.*, out of a pension payable to him; pursuant to an order of the Court for the Relief of Insolvent Debtors. It appeared, that Heward had petitioned the Insolvent Court for his discharge; but had been opposed; and that the Court had made an order under the 1 & 2 Vict. c. 110, s. 56 (a), for the payment of 40*l.*

Where the Court for the relief of Insolvent Debtors, under the 56th sect. of 1 & 2 Vict. c. 110, had made an order for the payment of a certain portion of an insolvent's pension to his assignees, and had required the commissioners of excise, by whom it was payable, to consent to such order, who had refused to do so. This Court declined to grant a mandamus to the commissioners of excise, compelling their consent.

(a) Sect. 56. "That nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being or having been an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the service of her Majesty, in the customs or excise, or any civil office, or other department whatsoever, or being or having been in the naval or military service of the East India Company, or an officer or clerk, or otherwise employed or engaged in the service of the Court of Directors of the said company, or being otherwise in the enjoyment of any pension whatever under any department of her Majesty's government, or from the said Court of Directors, to the pay, half pay, salary, emoluments or pension of any such prisoner, for the purposes of this act: Provided always, that it shall be lawful for the said Court to order such portion of the pay, half pay, salary, emoluments, or pension of any such prisoner,

as on communication from the said Court to the secretary at war, or the lords commissioners of the Admiralty, or the commissioners of the customs or excise, or the chief officer of the department to which such prisoner may belong or have belonged, or under which such pay, half pay, salary, emoluments, or pension may be enjoyed by such prisoner, or the said Court of Directors, he or they may respectively, under his or their hands, or under the hand of his or their chief secretary, or other chief officer for the time being, consent to in writing, to be paid to such assignee or assignees, in order that the same may be applied in payment of the debts of such prisoner; and such order and consent being lodged in the office of her Majesty's paymaster general, or of the secretary of the said Court of Directors, or of any other officer or person appointed to pay or paying any such pay, half pay, salary, emoluments, or pension, such portion of the said

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a-year out of a pension of superannuation which he received from the Board of Excise. Application had been made to the Commissioners of Excise to consent to this order; but the only answer that had been received was, that the request could not be granted. It is submitted, that although the insolvent himself could not assign his pension, and although it does not vest by virtue of the act of Parliament, in the assignees of the insolvent's estate; yet that the intention of the 56th section must be, to give the Insolvent Commissioners power over a portion of an insolvent's pension; unless the public board paying it, can shew cause to the contrary. The words of the 56th section are, "such portion of the pay," &c., "as such public board," &c., "may consent to," &c. The Court will construe those words to mean, that the Commissioners of Excise are bound to give their consent to the order of the Insolvent Court, unless they can assign some reasonable ground for refusing.

WILLIAMS, J.—It is admitted, that the insolvent himself could not assign this pension, and that it does not pass, as part of the insolvent's estate, to his assignees; but it is said, that under the 56th section, the Insolvent Court may order a portion of it to be paid, and that the Commissioners of Excise are bound to consent to that order, unless they can shew some reasonable ground for refusal. It appears to me, however, that the words of that section give the Commissioners of Excise a discretionary power to confer or withhold their consent. I have, therefore, great difficulty in granting a mandamus, compelling them to do an act, in which the statute says they are to have a discretion. It seems to me to be at least a case of novelty, and of great doubt; and, therefore, I must refuse a rule.

Rule refused.

pay, half pay, salary, emoluments or pension as shall be specified in such order and consent, shall	be paid to the said assignee or assignees, until the said Court shall make order to the contrary."
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PITCHER v. KING.

THIS was a motion for an attachment against a witness of the name of William Walker, for not appearing, pursuant to a writ of subpoena, in the above cause.

The affidavits on which the rule had been obtained, stated a service of a copy of the writ of subpoena on Walker, on the morning of the trial in Court, and that the original had, at the time of service, been shewn to him, and ten shillings given to him as conduct money. That Walker stated that he would be obliged to leave the Court for a short time, as he had to settle with the witnesses in a cause which had just been tried; but that he would be back in time for the plaintiff's cause. That the plaintiff cautioned him against being too late. That the cause came on for trial, and it became necessary to prove that a copy of the judgment, which the plaintiff offered in evidence, was a correct copy; and that Walker, who had examined it with the original, was then called on his subpoena, and not appearing, the plaintiff was obliged to submit to be nonsuited.

The affidavit of Walker, in opposition to the motion, shewed that he was managing clerk to an attorney of the name of Strick, and was in attendance at Westminster, on the day in question, conducting a cause which stood next but one in the list before the above-named cause. That immediately after the trial of the cause which he was so conducting, and about a quarter before eleven o'clock, the plaintiff came up to him, and handed him a wafered cover or envelope, saying, "Be careful how you open it, because there is something in it." That the envelope contained a half sovereign; together with a paper, partly printed and partly written, of which the following is a copy:—


In order to obtain an attachment against a witness, the original writ of subpoena must be shewn at the time of the service of the copy.

Where the witness, a managing clerk to an attorney, was served with a subpoena in Court about an hour before the trial came on, and whilst he was attending to the winding up of a cause in which he was engaged, and which stood next but one on the list before the cause in question: *Semble*, that this was not a sufficient service to warrant the granting an attachment.

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"*Victoria (a)*, by the grace of God, of the United Kingdom of Great Britain and Ireland *Queen (a)*, defender of the faith. To William Henry Walker, (and others,) greeting. We command you, and every of you, that all other things set aside, and ceasing every excuse, you, and every of you, be and appear in your proper persons, before Thomas, Lord Denman, our Chief Justice assigned to hold pleas in our Court, before us, at Westminster Hall, in the county of Middlesex, on Tuesday, the 26th day of November, 1844, by half-past nine o'clock in the morning of the same day, *and so on from day to day until this cause is tried (b)*, to testify the truth, according to your knowledge, in a certain action, now in our Court before us, at Westminster, depending between Augustus Edward Pitcher, plaintiff, and John James King, Esq., defendant, of a plea of trespass on the case, on the part of the plaintiff; and at the aforesaid day, by a jury of the country, between the parties aforesaid, of the plea aforesaid, to be tried; and this you, nor any of you, shall in no wise omit, under the penalty upon every one of you, of one hundred pounds. Witness, Thomas, Lord Denman, at Westminster, the twenty-third day of November, in the year of our Lord one thousand eight hundred and forty-four.

" Mr. W. H. Walker. To be in Court, at Westminster Hall, at half-past nine o'clock in the morning, on the 29th day of November, 1844."

That no original writ of subpoena was at that, or at any time shewn to him. That he went out of the Court for the purpose of paying the witnesses in the cause which he had been conducting; and, at the time, mentioned to the plaintiff that he was going so to do, who made no objection. That he used his utmost diligence in getting back to the

(a) These words in italics were written in ink over the printed words "William the Fourth," "King."

(b) These words in italics were interlined, and the printed words "then and there" struck out.

Court, which he did at a little before twelve o'clock; when he found that the cause had been called on in the meantime, and the plaintiff nonsuited. That he both wished and intended to obey the subpoena; and had not the slightest idea of wilfully absenting himself. That the examination of the copy judgment with the original, occurred in the year 1839, when he was an articled clerk with his uncle, who then acted as the agent of the plaintiff; and that he had not any recollection of having compared them. That the defendant's attorney had admitted the office copy of the judgment under a Judge's order; and that, therefore, he could not have been a necessary witness to prove that it was a correct copy. There was also an affidavit by Strick, confirming Walker's affidavit in some parts.

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Platt shewed cause. It is submitted, that this is not a case in which the Court will grant an attachment. Such a proceeding as the present is *strictissimi juris*, and the Court will demand that every requisite formality be complied with. Here the alleged service was too late. There was no original writ shewn. The copy served was full of gross errors. In the body of it the witness is desired to attend on "Tuesday, the 26th of November," instead of "Thursday, the 29th of November." The attendance is to be at half-past nine in the morning; and the service is not till a little before eleven o'clock. The witness is called "William Henry Walker," and his real name is "William Walker." It is directed to him, "and others," which shews it cannot be a copy of the original writ of subpoena, on which this motion is founded.

W. H. Watson, in support of the rule. The witness was served in sufficient time. He does not pretend to say he could not attend by reason of the lateness of the service; but attempts to excuse his absence on the ground that he thought he should be back in time. All that is required

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is, that the witness should have a reasonable time to enable him to get to the Court. Here he was in the Court, and, therefore, could clearly have attended. It is not necessary that the copy should state who the other witnesses were. That is immaterial matter, as far as this witness was concerned. The objection that this subpoena was served after the hour named for attendance, is immaterial; as the witness was bound to attend from day to day, till the cause came on for trial.

Cur. adv. vult.

WILLIAMS, J.—This was a motion for an attachment against a witness of the name of William Walker, for not appearing as a witness in the above cause; whereby the plaintiff, as he alleges, was obliged to submit to be nonsuited. There are many reasons, however, why I should hesitate to grant this motion. I have looked at the original writ of subpoena which has been handed to me, and one more full of errors, erasures, and interlineations, I certainly never saw, and the same remark applies to the copy which has been served. Before a party comes to the Court to ask for an attachment in a case of this nature, he should satisfy the Court that the process, upon the contempt of which he means to found his motion, has been clear, distinct, and unexceptionable. I should also feel some doubt whether the service which has been here effected has been reasonable in point of time; for though I can imagine that where a party is merely sitting in Court as a spectator, such a service might be sufficient; yet I am by no means clear, that when he is engaged in winding up a case in which he has been up till that moment employed, that serving him then with a subpoena, requiring immediate attendance, would be sufficient, in a motion of this nature. But it is not necessary I should give any decision on these points; for, on taking the affidavits together, I am satisfied that, in this case, there has been no exhibition of the original writ of subpoena to the witness. In order to bring a

party into contempt for disobeying a subpoena, the original writ should be shewn to the party at the time of service. This rule has always been acted on in such applications. There is a case of *Wadsworth v. Marshall* (a), in which, as counsel, I made precisely the same objection; and Mr. Baron *Bayley*, who was pre-eminent as an authority in matters of practice, was clearly of opinion that the original should have been shewn to the witness. To the same effect is the case of *Jacob v. Hungate* (b), and many other cases. As, therefore, I think there was no exhibition of the original, in this case, to the witness, the rule must be discharged.

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Rule discharged.

(a) 1 Cr. & M. 87.

(b) 3 Dowl. 456.

SMITH and Another v. LORD.

DEBT. The declaration was on a promissory note in the common form:—that the defendant, on the 23rd day of February, A. D. 1844, made his promissory note in writing, and thereby promised to pay to the plaintiffs, 24*l.* on demand, and then delivered the same to the plaintiffs, and thereby undertook and agreed to pay them the same according to the tenor and effect thereof: with a count on an account stated. The defendant pleaded, to the first count, that he did not make the promissory note, and to the second, the general issue. He also pleaded payment and set-off to the whole declaration. The trial took place before the assessor of the sheriff of Lancashire, and the promissory note was produced in evidence. From the learned assessor's notes, it appeared that the "note produced was dated 23rd of February 1841. The note was set forth in the declaration as dated 23rd of February 1844." The plaintiffs' advocate applied to have the record amended, but the act of Parliament not being then referred to, the

The statement in a declaration on a promissory note, that the defendant, on a certain day, made his promissory note, does not require proof that the note bore date on that day.

Quare, if it require proof that the note was actually made on the day named.

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learned assessor doubted whether he had power to make the amendment; but expressed his opinion that if he had, the case was a proper one for its exercise. The learned assessor accordingly nonsuited the plaintiffs, on the ground of the variance, reserving to them leave to apply to the Court above, to have the nonsuit set aside, if the Court should think the amendment ought to have been made; and, instead thereof, to enter a verdict for the plaintiffs for 12*l.*, the balance claimed on the note (*a*).

A rule nisi having accordingly been obtained to set aside the nonsuit, and to enter a verdict for the plaintiffs for the amount claimed.

Atherton, shewed cause. The assessor acted rightly in nonsuiting the plaintiffs. The variance was a material one. Under the old form of pleading, the plaintiffs would have declared upon the note as being made on a certain day, and bearing date a certain day; and although it would have been immaterial, according to the case of *Coxon v. Lyon* (*b*), if there had been a variance between the day on which it was stated to be, and that on which it really was made; it would not be so with respect to the statement of the day on which it bore date; *Anon.* (*c*); *Beckett and Others v. Dutton* (*d*). The form given, under the New Rules, must be taken to include all that was necessary to be alleged in the old form; and, therefore, the day now given, must be taken to include both the day on which it bears date, as well as the day on which it is made. [*Wightman*, J.—Was it necessary, under the old form of pleading, to allege when the note bore date? It used to be not an uncommon practice to omit it as immaterial. In *Chitt. on Bills*, p. 563, 9*th* ed., it is said, “With respect to time, if it be alleged in the declaration, that defendant on such a day

(*a*) It did not appear that the consent of the parties had been obtained to this arrangement.

(*b*) 2 Campb. 307, n.

(*c*) 2 Campb. 308.

(*d*) 7 M. & W. 157; See S. C. 8 Dowl. 865.

(without laying it under a *videlicet*) drew a bill of exchange, without alleging it bore date on that day, a mistake of the day will not be material, but if the words ‘bearing date the same day and year aforesaid, be inserted, then a variance would be fatal.”] That is there stated on the authority of the case of *Coxon v. Lyon* (a). If the view now submitted be correct, and the variance a material one; although it might have been amended at the trial, under the 3 & 4 Wm. 4, c. 42, s. 23, the Court has now no power to do so. The 23rd section, which gives the power of amendment in cases of variance, clearly refers only to the exercise of that power at the time of the trial. The learned assessor should either have allowed the amendment at the trial, and left it to the defendant to question the propriety of it; or directed the jury to find the facts specially; upon which the Court, by sect. 24, would have had the power to give the judgment upon the merits, notwithstanding the variance. As to the terms of the present rule, it is clear that the assessor had no right to reserve leave for the plaintiffs to enter a verdict, without the consent of the parties.

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Cobbett, J. P. The case of *Coxon v. Lyon*, is precisely in point, and shews that where a declaration is drawn in this form, it is not necessary that the date of the bill should correspond with the date on which it is stated to be made in the declaration.

WIGHTMAN, J.—According to a case of *De la Courtier v. Bellamy* (b), where the date of the bill of exchange is omitted in a declaration, the Court will intend the date of the drawing to be the date of the bill. That shews that the omission of the date which it bears is not demurrable. Then according to the case of *Coxon v. Lyon*, the variance between the day on which it is stated to be drawn, and that on which it really is drawn, is immaterial. Had this

(a) 2 Campb. 307, n.

(b) 2 Show. 422.

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objection, therefore, arisen under the old forms of pleading, I should have been inclined to treat it as unimportant. I will, however, take time to consider whether the New Rules have in any way altered the effect of the statement of the date.

Cur. ad. vult.

WIGHTMAN, J.—This was an application to set aside a non-suit in a cause which had been tried before the assessor of the sheriff of Lancashire, and to enter a verdict instead for the plaintiffs for the amount claimed, pursuant to leave reserved at the trial. The rule will be absolute, not in the form in which it is sought to be obtained, but for a new trial. It is not necessary that I should consider whether the form prescribed by the New Rules must be strictly supported by the evidence, as to the day on which it is stated that the note is made; because the learned assessor seems to have fallen into a mistake when he states that the note was set forth in the declaration as dated on a particular day. The form used here, is that given by the New Rules, in an action against the maker of a promissory note, and does not state the note as bearing date upon any day, but merely that the defendant made it upon such a day. The learned assessor, without requiring any evidence to be given as to the day upon which the note was made, held the statement in the declaration as giving a date to the note. Now the case of *Coxon v. Lyon* (a), shews that the statement that a bill of exchange was made on a particular day, is not a material averment, and that it would be supported by proof of the bill having been made on a different day; and the reason given is, that the bill may have been made on a different day from the one on which it bears date. That case, however, occurred before the New Rules. But the question there raised, does not arise here; and I give no opinion whether, since the New Rules, the averment

(a) 2 Campb. 307, n.

that the note is made on a particular day, requires strict proof; for that point has not been raised by the assessor. If the assessor had required proof to that effect to be given, the plaintiffs might possibly have been able to have done so. The date might have been true as stated in the declaration; although, on the face of the note, the date appeared to be different. The case must, therefore, go down for a new trial.

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Rule absolute for a new trial.

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BY indentures of lease and release, dated the 14th and 15th days of October, 1830, and made between Mary Robinson, Winifred Robinson, and Jane Robinson, of the one part; and Thomas Major, the elder, and Thomas Major, the younger, (the above-named plaintiff,) of the other part; certain freehold land and premises, therein described, were conveyed and assured unto the use of the said Thomas Major, the elder, and the plaintiff, their heirs and assigns, upon certain trusts therein mentioned, for the benefit of the said M. R., W. R., and J. R., during their joint lives, and the life of the survivors or survivor of them; and after the decease of the survivor, then upon trust, that the said Thomas Major, the elder, and the plaintiff, or the survivor of them, or the heirs or assigns of such survivor, should, out of the rents, issues and profits of the said freehold land and premises, or by mortgaging or selling the same,

The plaintiff had brought an action against the defendant for the rent of certain premises to which he claimed to be entitled. The executors of T. M., the elder, also claimed the same premises. An interpleader issue was thereupon directed, in which the present plaintiff was made defendant, and the executors of T. M., the elder, were plaintiffs. The issue was found in favour of

the executors. Afterwards, by an indenture of lease and release, made between the plaintiff of the first part, the children of T. M., the elder, of the second part, and the executors of T. M., the elder, of the third part; after reciting various transactions, but not alluding to the interpleader issue, the parties thereto of the second and third parts did "acquit, release, and for ever discharge the plaintiff, his heirs, &c., of and from all costs, charges, and expenses, which they or either of them might have incurred, in and about the matters therein particularly mentioned and referred to, and also of and from all claims and demands, which they the said parties thereto of the second and third parts could or might have, or claim against the plaintiff for or by reason or on account of any transaction which might have hitherto taken place between them, or any or either of them:" *Held*, that these words did not extend to release the several claim for costs of the interpleader issue, which the executors of T. M., the elder, had against the plaintiff.

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&c., levy and raise such sum of money as should be sufficient to make good the deficiency, (if any,) of the personal estate, not specifically bequeathed, of the survivor of them, the said M. R., W. R., and J. R., in answering the several legacies therein referred to, being certain legacies mentioned in the will of the survivor of them, the said M. R., W. R., and J. R.; and subject and without prejudice to the raising and payment of such sums of money for the purposes aforesaid, and charged and chargeable therewith, the said M. R., W. R., and J. R., declared and agreed that the said lands, hereditaments, and premises therein comprised, and thereby granted and released, or otherwise assured, or intended so to be, with the appurtenants, should, from and immediately after the decease of the survivor of them, the said M. R., W. R., and J. R., go, remain, and be, to the only proper use and behoof of the said Thomas Major, the elder, and the plaintiff, their heirs and assigns for ever, as tenants in common, and not as joint tenants. The said M. R., W. R., and J. R., did, by their respective mutual wills, dated on the same day as the release above named, and to the same purport and effect as each other, give and bequeath certain legacies, specific and otherwise, as therein mentioned. The said W. R., and J. R., died previously to M. R.; and M. R., by a codicil to her will, dated in April, 1839, attempted to revoke and make void the above-mentioned deeds of lease and release, and the mutual wills of M. R., W. R., and J. R., by disposing of the whole of her property to Thomas Major, the elder. M. R. died in 1842, and the validity of the codicil and the will were the subject of a suit at present pending in the Ecclesiastical Court, between the next of kin of M. R., the executors of Thomas Major, the elder, and the plaintiff. Thomas Major, the elder, died in the month of July, 1843; and by his will, dated in the previous month of June, appointed William Major, Harry H. P. Major, Sarah Major, and William Alexander, executors and trustees thereof. Under his will the plaintiff took no beneficial

interest, beyond a shilling. The present action was brought for a half-year's rent, due at Michaelmas, 1843, from the defendant, who was the occupier of the land and premises mentioned in the deeds of lease and release of October, 1830. A claim being also made to the rent, by the executors of T. Major, an interpleader order was made, whereby the executors were directed to be the plaintiffs, and the present plaintiff, the defendant; and the money (25*l.*) was paid into Court, to abide the event. The issue was tried at the Berkshire Spring Assizes for 1844, and a verdict found for the executors. On the 29th of March, the plaintiff filed a bill of complaint in Chancery against the executors of T. Major, and also against all other parties interested under the will of T. Major, praying for an injunction against the executors, to hinder them from further prosecuting their suit. In Easter Term, the executors obtained a rule nisi for the payment of 25*l.* out of Court to them, and for the costs of the interpleader rule, and issue. An arrangement was then made, by consent, to suspend all further proceedings till the bill for an injunction could be argued. On the 10th of April, the plaintiff filed another bill of complaint against the trustees under his mother's marriage settlement, the executors of T. Major, and other parties interested in the will of T. Major, praying that the plaintiff's interest, under his mother's marriage settlement, should be declared by the Court of Chancery. Immediately after such bill was filed, proposals for an amicable arrangement were made; and, finally, a deed of release was prepared and executed, on the 24th of May, 1844, between the plaintiff, of the first part; Harry H. P. Major, Sarah Major, John P. Major, William Major, and Clara Major, (who, together with the plaintiff, were the six only children of T. Major, deceased, and Sarah his wife,) of the second part; and William Major, Harry H. P. Major, Sarah Major, and William Alexander, executors of T. Major, deceased, of the third part. It recited, that the said T. Major, the elder, had bequeathed to the plaintiff, as his eldest son,

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and heir at law, one shilling, in lieu of, and in satisfaction of, all claims and demands which he might have in respect of his mother's marriage settlement, and also in lieu of, and in satisfaction of, all and every other claim and demand which the plaintiff could or might have against the freehold or personal property of the said T. Major the elder; and witnessed that he the plaintiff did, in consideration of the sum of 500*l.*, grant, bargain, sell, assign, transfer, and set over unto the said parties of the second part, all that the one-sixth part or share therein mentioned; and for the consideration aforesaid, he the plaintiff did, by those presents, acquit, release, and discharge the said parties thereto of the second and third parts, in manner therein mentioned, from all costs incurred by, and now due, and owing to, the plaintiff, and all actions, suits, accounts, reckonings, claims and demands, whatsoever, of him the plaintiff, under or by virtue of, or for, or upon account or in respect of, the trusts or provisions contained in the said indenture of settlement of the 25th of December, 1802, and otherwise as therein mentioned; but so, nevertheless, and it was thereby expressly provided, declared and agreed, that the assignment and release thereinbefore contained, should not either of them extend to or affect, or in any manner prejudice the right or title which the plaintiff claimed to have, or be entitled to, in the estate and effects of the said Mary Robinson, Winifred Robinson, and Jane Robinson, respectively deceased, under their respective wills, or any costs, charges or expenses, which the plaintiff might have been put to, or incurred in relation thereto, or otherwise howsoever. And it was thereby mutually agreed, by and between all the parties thereto, and the said parties thereto of the second and third parts, did thereby respectively declare that, inasmuch as the plaintiff had, for the considerations aforesaid, agreed to waive for ever, all and every, or any, his right, title, claim and interest, (if any,) under or by virtue of the respective wills of the said Thomas Major, the elder, and John Pearce, and the settlement therein

referred to; the said parties thereto of the second and third parts did thereby acquit, release, and for ever discharge the plaintiff, his heirs, executors, administrators, and assigns, of and from all costs, charges and expenses, which they or either of them might have incurred in and about the matters therein particularly mentioned and referred to, and also of and from all claims and demands, which they the said parties thereto of the second and third parts could or might have or claim against the plaintiff, for, or by reason or on account of, any transaction which might have hitherto taken place between them, or any or either of them.

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On the part of the plaintiff, a rule having been obtained (*a*), calling on the executors of T. Major, the elder, to shew cause why the 25*l*. should not be paid out of Court to the plaintiff, together with the costs of the present application:

A cross rule was obtained (*a*) on the part of the executors of T. Major, the elder, reviving the rule of Easter Term, 1844, and calling on the plaintiff to shew cause why the 25*l*. should not be paid out of Court to the executors, together with the costs of the interpleader issue, and the costs of the present and former rules.

Both rules now coming on together,

Talfourd, Serjt., and *Gray*, on behalf of the executors of T. Major, the elder. The question in this case will turn upon the effect of the deed of release of the 24th of May, 1844. The executors are clearly entitled to the payment of the 25*l*. out of Court to them; for that sum was paid into Court to abide the event of the interpleader issue, and that has been decided in favour of the executors. It clearly is not included in the proviso by which the plaintiff is released and discharged from all claims and

(*a*) In Michaelmas Term.

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demands which the parties of the second and third parts to the release might have against him. This is not a demand against the plaintiff, but a demand against the tenant for his rent, to which the Court have decided the executors are entitled. They also have a perfect right to the costs of the interpleader rule and issue, for that is not released by the proviso in the deed. There is nothing in the recitals of the deed to lead to the inference that these costs were intended to be included. Indeed, the releasing part by the plaintiff, expressly excepts, from the operation of the deed, the property of Mary Robinson and her sisters. This sum of money results from that property. The general words of a release may be limited by the particular matter out of which the release springs, and be restrained by a particular recital; *Upton v. Upton* (a); *Ramsden v. Hylton* (b); *Butcher v. Butcher* (c); *Payler v. Homersham* (d); *Bain v. Cooper* (e); *Simons v. Johnson* (f); *Knight v. Cole* (g). Besides, here the release is jointly from the parties of the second and third parts. How could the parties of the second part give a release of the costs of the interpleader rule and issue to which they had no claim? [*Wightman, J.*—There are the words “or any or either of them.”] Those words may be referred to the demands, and not to the parties. They do not occur in the releasing part, but merely in the description of the subject matter released. Joint words demand to be construed jointly, *Com. Dig.* tit. “*Obligation*” (F.); *Garland v. Noble* (h). The effect of the proviso is to release those claims in which all the parties are jointly interested; although such claims may have arisen out of transactions to which only some of them were parties. There is still this further answer to the construction sought to be put upon this release, that it is not

(a) 1 Dowl. 400.

(b) 2 Vez. 304.

(c) 1 New Rep. 113.

(d) 4 M. & S. 423.

(e) 9 M. & W. 701.

(f) 3 B. & Ad. 175.

(g) 1 Show. 150.

(h) 1 Moore, 187.

clear how these parties could be held to undertake to release a claim which they had in the light of trustees for other parties.

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Hoggins and Lush contra. The plaintiff, by this deed, expressly reserved to himself the right to any costs to which he had been put by matters arising out of the claim to the Robinsons' estate; and, although the opposite party must thus have had their attention expressly directed to the subject, they made no similar reservation. The words of the proviso are several as well as joint. But if not, this is a release of a claim in which all are interested; for if the costs are payable out of the trust estate, it will be, by that amount, diminished; and the parties of the second part, are clearly interested, inasmuch as they are the children of T. Major, the elder, out of whose estate these costs will ultimately have to come. The costs of the interpleader rule and issue do not follow as of right the event of the issue; therefore they may be well included under the words "claims and demands." The words of release are to be taken most strongly against the releasor.

WIGHTMAN, J.—In this case the plaintiff's rule must be discharged, and the rule obtained on behalf of the executors of T. Major, the elder, made absolute. The question is, whether, under the terms of this deed of release, the costs of the interpleader rule and issue, were or were not included. The words are, "the parties thereto, of the second and third parts, do hereby acquit, release, and for ever discharge the plaintiff, his heirs, executors, administrators, and assigns, of and from all costs, charges, and expenses which they, or either of them, may have incurred in and about the matters herein particularly mentioned and referred to, and also of and from all claims and demands, which they, the said parties hereto, of the second and third parts can or may have or claim against the plaintiff for or by reason,

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or on account of any transaction which may have hitherto taken place between them, or any or either of them."

It seems to me, that, taking the recital and the operative parts of this deed together, these costs were not included in those released to the plaintiff. Unquestionably, if the words were large enough to include the costs, I should be very unwilling to decide that they were not comprehended in the release. But are they sufficiently large? Now it is remarkable, that although several classes of costs are mentioned, there is no mention made of these costs of the interpleader rule, and no allusion made to the money which had been paid into Court. But then, it is contended, that the present claim, is included in the general words at the end of the second releasing clause in the deed, namely, "all claims and demands which they, the said parties thereto, of the second and third parts, can or may have, or claim against the plaintiff, for or by reason, or on account of any transaction which may have hitherto taken place between them, or any or either of them." Is this, then, a claim which the parties of the second and third parts could have against the plaintiff? I think it is not, and that the words which follow, "or any or either of them," will not qualify the preceding words. All that is released is the joint claims of the parties of the second and third parts; and then the subsequent words may be reconciled by supposing the case of a joint claim in respect of transactions in which only some have taken a part. But this cannot be held to be a joint claim of the parties of the second and third parts. It is merely a personal charge upon the parties to the interpleader rule, and can affect those parties alone.

Rule for payment of the money, &c.
to the plaintiff, discharged.

Rule for payment, &c. to the executors,
made absolute.

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BILLING v. RAILTON.

THE issue had been delivered in this case with an award of a writ of trial, dated the 3rd of January in the present year, and returnable on the 15th of April. Notice of trial had been given at the Sheriff's Court of London, for the 11th of January; but a Judge's order was obtained for its postponement till the 16th; on which day the trial took place, and a verdict was substantially found for the defendant. On the defendant's applying on the following day, to the proper officer having the custody of the writ of trial, to know when he would return the writ into this Court, he found that the writ was not returnable till the 15th of April; and the officer stated he could not return it before that time without an order from this Court. The affidavit in support of the motion, also stated, that if the writ were not returned before the 15th day of April, the defendant was likely to lose the benefit of his verdict. On the part of the plaintiff it was sworn, that he believed the merits of the action to be with him; that the verdict was against the evidence, and that he intended to move for a new trial; that his reason for making the writ returnable at so distant a day, was, that he was uncertain whether it could be tried during Hilary Term, and that he was desirous of saving the expense which would have been incurred by altering the return day. The affidavit also denied that the defendant would be less able to recover his costs in April than at present.

Where the plaintiff in issuing a writ of trial, on the 3rd of January, had made it returnable on the first day of Easter Term following, and the trial was had on the 16th of January, and a verdict returned for the defendant; the Court, on the motion of the defendant, ordered the sheriff to return the writ forthwith.

Hoggins having obtained a rule (a) to shew cause why the writ of trial in this cause should not be returned unto this Court, upon notice of this rule in the mean time being given to the Judge of the Sheriff's Court of London;

(a) On the 25th of January.

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Edwin James shewed cause. This is an application of a novel character, and as such the Court will hesitate to grant it. The stat. 3 & 4 Wm. 4, c. 42, under which these writs of trial are issued, by sec. 19, provides that the provisions of 1 Wm. 4, c. 7, shall apply to all judgments and executions upon writs of trial. On referring to the last mentioned statute, the second section gives the Judge power to certify for immediate execution. Therefore, if the defendant be entitled to the substance of this motion, the proper form would have been by application to the sheriff at the trial, to certify for immediate execution for the amount of defendant's costs. But the defendant did not think proper to take this obvious course, and the Court will not now assist him by granting so unusual an application. Some period of time must always elapse between the trial and the return day; and how can the Court draw any line and say, what interval in each particular case shall be sufficient? The act of Parliament does not prescribe any limited time, within which a writ of trial must be returnable; and it must be left to the discretion of the plaintiff, who for his own sake will not make the day unreasonably distant.

Hoggins in support of the rule. The interval that has here been fixed between the day of trial and return day, is much beyond the time which in ordinary practice is found sufficient. The object of this plainly enough is to protect the plaintiff from any execution for the defendant's costs, in the event, which has happened, of his not succeeding in obtaining a verdict. It is very doubtful whether the sheriff really has any such power, as is alleged by the other side, to grant the defendant immediate execution for his costs. At any rate, the Court will not refuse to assist the defendant on that ground; but seeing that the plaintiff has departed in this instance from the ordinary practice, will make this rule absolute, so that the defendant may not suffer by the delay. The power which it is sought to induce

the Court to exercise in this instance, is by no means of an unusual character. It is the constant practice for the Court to order the sheriff to return a writ.

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WILLIAMS, J.—The language of the act of Parliament undoubtedly leaves the time at which the writ of trial is to be returnable, wholly unspecified, and merely directs it to be on “a day certain in Term or in Vacation to be named in such writ;” and it is therefore contended, that the return day of this writ being the first of the succeeding Term, is within the provisions of the statute. But if so, the writ might equally have been made returnable in Trinity or Michaelmas Term, or even on a day three years hence. I therefore think I am bound to look at what the practice has been in this respect; and the Master informs me, that it undoubtedly is to make the writ returnable in the Term in which the trial is had, where there is an interval of sufficient time for that purpose between the day of trial and the last day of the Term; and where the trial takes place in Vacation, to make the writ returnable on the same or the following day. As it is not contended but that the usual course has been departed from in the present instance, and as I can see no inconvenience which can result to the sheriff from making a return at once, I shall, on the single ground that this is a departure from the strict rule of practice, which has always been pursued, and not upon any construction of the act, make this rule absolute.

Rule absolute. (a)

(a) “It is ordered that the writ of trial be returned into this Court.” The rule was never drawn up; as the plaintiff, on the same day, (the last day of the Term), obtained a rule nisi for a new trial, subject to the exception of the application being in time.



1845.

THOMAS HOLT v. The QUEEN.

Where a party is in custody of the keeper of the Queen's prison under a judgment of imprisonment on a conviction for a libel, which judgment is afterwards reversed on error; the Court will, on motion, order him to be discharged out of custody.

IN this case, Thomas Holt, the plaintiff in error, had been convicted on an indictment for libel, and sentenced to twelve months' imprisonment, which expired on the day of the present motion (*a*). He had also been convicted on another indictment, and had been sentenced to a term of imprisonment, to commence from the day of this motion. Holt had brought a writ of error on this latter judgment, and had obtained a judgment of reversal for non-joinder in error.

M. D. Hill (with whom was *White*), moved for a rule that the plaintiff in error, should go without day as respected the latter judgment. It was necessary, it was submitted, to obtain a rule to this effect from the Court, in order that the officer having the defendant in custody, might be formally informed of the reversal of the second judgment.

WIGHTMAN, J.—I do not see how the interposition of this Court becomes necessary; as what is sought by the rule is nothing more than what is already decreed by the judgment. I will, however, inquire into the practice.

Subsequently, on the same day,

WIGHTMAN, J., said, that the rule might go; but not in the terms prayed for, as they would be nugatory. The rule would be to discharge the prisoner (*b*).

Rule accordingly.

(*a*) The 28th of January.

(*b*) The rule was drawn up in the following terms: "Upon reading the entry of the reversal of the judgment given against the plaintiff in error in this cause;

it is ordered that the said plaintiff in error be discharged out of the custody (of the keeper of the Queen's prison) as to his commitment, by virtue of the said judgment."

1845.

REGINA v. The JUSTICES of CORNWALL.
(PENRYN v. FALMOUTH).

A RULE had been obtained (*a*), calling on the justices of the peace, for the county of Cornwall, to shew cause why a writ of certiorari should not issue to bring up an order of two justices of the county of Cornwall, and an order of two justices of the borough of Falmouth, adjudicating as to the settlement of a lunatic pauper (under the 9 Geo. 4, c. 40).

The order of the two justices of the county, reciting the order of the borough justices, was as follows:—

Cornwall to wit. To the overseers of the poor of the borough of Penryn, in the county of Cornwall.

Whereas, heretofore, to wit, on the 3rd day of March, 1843, at the borough of Falmouth, in the said county, by a certain order of Joseph Fox, mayor of the said borough, and John Hill, Esq., two of her Majesty's justices of the peace in and for the said last mentioned borough; reciting, that it appeared to them, having called to their aid one Frederick Charles Bullmore, a surgeon, that one Elizabeth Deacon, otherwise called Elizabeth Worsdale, chargeable to the town of Falmouth aforesaid, was insane, and they, therefore, thereby ordered and directed the said overseers to cause the said Elizabeth Deacon, otherwise called Elizabeth Worsdale, to be conveyed to the county lunatic asylum, established at Bodmin, in the said county. And whereas, in pursuance of the said order, the said Elizabeth Deacon, otherwise, &c., was, thereupon, afterwards, on the day and year last aforesaid, conveyed to the said lunatic asylum, and was then and there delivered to the proper officer thereof, who, then and there, accepted and received the said Elizabeth Deacon, otherwise, &c., into the said asylum; and the said Elizabeth Deacon, otherwise, &c., was then and hath been, from thence, hitherto kept and detained, and is still kept and detained in the said asylum as insane, where she

Where an order for the removal of a pauper lunatic to the county asylum, under the 9 Geo. 4, c. 40, s. 38, had been made by two justices of a borough, and the pauper was confined under it in the county lunatic asylum, an order of two justices of the county adjudicating upon the settlement of such pauper, and ordering the payment of expenses under sect. 42, was held bad.

(*a*) In Easter Term.

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hath ever since been and still is maintained. And whereas, at the time of the making of the order aforesaid, the place of the last legal settlement of the said Elizabeth Deacon, otherwise, &c., had not been ascertained, and it is necessary now to inquire into and ascertain the same, according to the exigency of the statute, in such case made and provided, in order that the reasonable charges of the removing, maintenance, medicine, clothing, and care of the said Elizabeth Deacon, otherwise, &c. (incurred within twelve calendar months previous to the date of this order), may be repaid, and the future expenses, necessary for the maintenance, medicine, clothing, and care of the said Elizabeth Deacon, otherwise, &c., whilst she remains insane, may be provided for. Therefore we, John Samuel Enys and George Croker Fox, Esqrs., being two of her Majesty's justices of the peace in and for the said county of Cornwall, having accordingly inquired into the place of the last legal settlement of the said Elizabeth Deacon, otherwise, &c., and it being now satisfactorily proved before us, as well as by the oaths of Benjamin Deakin, Richard Ockleshrow, James George Julyan, Thomas Small Skinner, Francis Mitchell, and Thomas Mitchell, as otherwise, that the said borough of Penryn, in the said county, is the place of the last legal settlement of the said Elizabeth Deacon, otherwise, &c.: we do, therefore, hereby adjudge the place of the last legal settlement of the said Elizabeth Deacon, otherwise, &c., to be in the said last mentioned borough. And we do hereby order the overseers of the said last mentioned borough, to pay unto the overseers of the town of Falmouth aforesaid, the sum of 3*l.* 18*s.* 6*d.*, being the reasonable charges of conveying the said Elizabeth Deacon, otherwise, &c., to the said county lunatic asylum; and, also, the further sum of 2*l.* 10*s.* to the treasurer to the said county, being the amount of the several sums aforesaid, which by him have been hitherto paid for the reasonable charges of the maintenance, medicine, clothing, and care of the said Elizabeth Deacon, otherwise, &c., in the said lunatic asylum; and also the sum of 5*s.* 6*d.* weekly,

and every week, to the treasurer of the said county lunatic asylum, or such other sum weekly as shall be, from time to time, hereafter fixed on, in that behalf, by the visitors of the said county lunatic asylum.

Given under our hands and seals, the 21st day of October, in the year of our Lord, 1843.

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G. CROKER FOX.

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The following objections were stated to the order ; first, that the justices being justices for the borough, and not for the county, had no power to make the order for confinement of the pauper in the lunatic asylum for the county of Cornwall, under the act (9 Geo. 4, c. 40). Secondly, that the order should have been for payment to the treasurer of the county, and not to the overseers of the expenses of conveying the pauper. And, thirdly, that the justices had no power to order the payment of 5s. 6d., or any specific sum ; but only of such sums as the visitors should order.

Merivale, shewed cause. The first objection might have been good by way of appeal on the original order. That step not having been taken, it is submitted that the sessions had power to adjudicate on the settlement of any pauper lunatic, confined in the county asylum under the order of any two justices. The words of the forty-second section (a), are very general. They give power

(a) Sect. 42 enacts, " That where the legal settlement of any insane person, confined under any order of any two justices at any county lunatic asylum, public hospital, or any licensed house, has not been ascertained, it shall and may be lawful for any two justices acting in and for the county in which such county lunatic asylum, public hospital, or licensed house is situate, at any time to inquire into the last legal settlement of such insane person ; and if satisfactory evidence can be obtained as to such settlement, it shall and may be lawful for such justices to make an order upon the overseers of the parish or township where such last legal settlement of such insane person shall be adjudged to be, for the repayment of the reasonable charges of the re-

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to make the order "where the legal settlement of any insane person, confined under any order of any two justices at any county lunatic asylum, &c., has not been ascertained." If it had been meant to restrict the power, the Legislature would, probably, have said "under any order made as aforesaid." The other objections are only to part of the order.

M. Smith, in support of the rule, was stopped by the Court.

WIGHTMAN, J.—I think this rule must be made absolute, as the first objection appears to me to be fatal. The words "any order," in the forty-second section, must mean any valid order.

Rule absolute.

moving, maintenance, medicine, clothing, and care of such insane person, incurred within twelve calendar months previous to the date of such order, such charges having been first proved to the satisfaction of such justices, and the amount thereof being set forth in such order; and it shall and may be lawful for the said or any

other two justices of the peace of the said county, to provide for the future expenses necessary for the maintenance, medicine, clothing, and care of such insane person, in the manner as has been hereinbefore directed for the two justices before whom such person was originally examined."

Ex parte HART.

An insolvent, after an adjudication of final discharge at the expiration of a certain period, was arrested during that period by the creditors,

HOGGINS had obtained a rule (a), calling on Charles Milner, and Robert Boyne, or their attorney, to shew cause why a warrant of attorney, and defeazance thereon, given by one Charles Hart, should not be set aside; and

(a) In Michaelmas Term.

at whose suit he was remanded, under a *capias ad respondendum*, issued by virtue of the 85th sect. of 1 & 2 Vict. c. 110. He, thereupon, in order to obtain his release from custody, executed a warrant of attorney for the debt, and paid a sum of money by way of instalment, and another sum for the costs of preparing the warrant of attorney. The Court ordered the warrant of attorney to be set aside, and the sums of money so paid to be refunded.

why the said Charles Milner, and Robert Boyne, or their attorney, should not refund the sums of 13*l.*, and 5*l.*, paid to the said attorney, on account of the debt, and costs of preparing the said warrant of attorney, with costs.

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The facts, as they appeared on the affidavits, were shortly these. Hart, having been arrested at the suit of one Cocking, petitioned the Court for the Relief of Insolvent Debtors; and at the hearing before the Commissioners, on the 3rd of May, was opposed by Messrs. Milner and Boyne, who were creditors of his, and whose debt of 81*l.* 2*s.* 4*d.*, was inserted in his schedule. At their instance, he was remanded for seven months, to commence from the date of the vesting order, the 26th of March, 1844. Immediately after the adjudication, Hart obtained the consent of his detaining creditor to his release out of prison; and was accordingly discharged out of custody. Messrs. Milner and Boyne made an application to the Court of Insolvent Debtors, for a detainer against him, which was granted; but before it could be lodged with the gaoler of the sheriff's prison for the county of Surrey, Hart had been discharged from his custody. Milner and Boyne then sued out, on the 3rd of June, a writ of *capias ad respondendum*, under the 1 & 2 Vict. c. 110, s. 85, indorsed for 81*l.* 2*s.* 4*d.* debt, and 3*l.* costs; by virtue of which Hart was arrested on the 7th of June. Whilst he was in custody, Cranch, the clerk to the attorney of Messrs. Milner and Boyne, called upon him, and proposed, as Hart stated, (but which was denied in Cranch's affidavit, who said that the proposition came from Hart, who pressed him urgently to accede to it,) that he should give a warrant of attorney for the sum of 49*l.*, and that he would then consent to his being discharged. That he accordingly did so; and was thereupon released; and that he had paid to the attorney of Milner and Boyne the sum of 13*l.*, on account of the sum of 49*l.*, and also the sum of 5*l.*, being for the expenses of preparing the warrant of attorney.

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Greenwood and *W. Payne* now shewed cause. This warrant of attorney has not been given, as is contended, in contravention of the statute 1 & 2 Vict. c. 110. Messrs. Milner and Boyne were undoubtedly entitled to issue the writ of *capias ad respondendum*, under the 85th section of that act; and the arrest of Hart, and his subsequent custody, out of which he was released on giving the warrant of attorney, were perfectly legal. It therefore might form a valid consideration for the warrant of attorney, that Messrs. Milner and Boyne should permit him to be discharged out of custody, at their suit. In *Collins v. Benton (a)*, the Court set aside the execution on a judgment on a warrant of attorney given for a debt which had been included in the insolvent's schedule, and with respect to which he had been discharged; but held it must stand as far as respected the costs of opposing the insolvent's discharge, which he had taken upon himself to pay. An agreement to forego opposition to the insolvent's discharge, it may be admitted, would form no valid consideration for a warrant of attorney given for the payment of the same debt; *Rogers v. Kingston (b)*; because that would be a fraud on the other creditors, and would obstruct the course of justice, by keeping the Insolvent Court in ignorance of the real character of the insolvent's conduct and affairs. But after the Court has adjudicated, and the prisoner is remanded at the suit of a creditor, his discharge from that imprisonment may, it is submitted, form a legal consideration for a new promise to pay that debt. The case of *Ashley v. Killick (c)*, which will be relied on by the other side, was not under the present act; and, besides, that was not an application to the Court to interfere on motion; and the Courts have drawn a distinction between motions to set aside securities of this nature, and the effect of a plea

(a) 9 Dowl. 905; See S. C. (b) 10 Moore, 97; S. C. 2
3 Scott, N. R. 183; 2 M. & G. Bing. 441.
861. (c) 5 M. & W. 509.

of their invalidity in an action brought to enforce them. [They referred to *Kay v. Masters* (a); *Sweenie v. Sharp* (b); *Philpot v. Aslett* (c); *Brook v. Wood* (d); *Denne v. Knott* (e); *Smith v. Alexander* (f); *Jackson v. Davison* (g), and *Gould v. Williams* (h).]

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Crowder, (with whom was *Hoggins*), in support of the rule. [*Wightman*, J.—It appears to me, that the case of *Ashley v. Killick* (i) is a direct authority that this rule should be absolute, to set aside the warrant of attorney; but I have some doubt as to that portion of the rule which relates to the refunding the money.] It is submitted, that wherever a party under arrest pays a sum of money to obtain his discharge, which payment is void, the Court will order it to be refunded. Here the money has been paid under a warrant of attorney, which was void. He cited *Rogers v. Kingston* (k), and *Evans v. Williams* (l). [He was then stopped.]

WIGHTMAN, J.—I think this rule must be made absolute, but not with costs. The debtor has already had the benefit of this warrant of attorney, in being discharged out of custody; and is now coming to the Court to undo that which he himself has done. I think, therefore, that he is not entitled to ask for costs.

Rule absolute, without costs.

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| (a) 1 Dowl. 86. | (f) 5 Dowl. 13. |
| (b) 4 Bing. 37; See S. C. | (g) 4 B. & A. 691. |
| 12 Moore, 163. | (h) 4 Dowl. 91. |
| (c) 1 C., M. & R. 85; See S. C. | (i) 5 M. & W. 509. |
| 2 Dowl. 669. | (k) 10 Moore, 97; See S. C. |
| (d) 13 Price, 667. | 2 Bing. 441. |
| (e) 7 M. & W. 143; See S. C. | (l) 1 Cr. & M. 30. |
| 9 Dowl. 224. | |



1845.

WILLIAMSON v. LOCKE.

The declaration in an action on the case contained three counts ; to which the defendant had pleaded not guilty, and to each of the counts, various special pleas, which went to the whole cause of action in each count. The action, and the damages sought thereby to be recovered, and all matters in dispute therein, were referred to arbitration ; the costs of the action, and of the reference and award, to abide the event of the award. The arbitrator awarded that the plaintiff had good cause of action in respect of the second count, and was entitled to recover a certain sum for damages on that count ; but that he had no cause of action in respect of the first and third counts. The Court ordered the Master to tax the plaintiff his costs in the cause ; upon the plaintiff's allowing the costs of the first and third counts, and of the issues relating to the first and third counts, to be taxed for the defendant.

THIS was an action on the case. The declaration contained three counts, to which the defendant pleaded not guilty ; and to each of the counts, he also pleaded separate pleas, which went to the whole cause of action in each count.

The cause stood for trial at the Liverpool Summer Assizes for 1844, when, by an agreement of reference, dated the 13th of August in that year, "the said action at law, and the damages sought thereby to be recovered, and all matters in dispute therein," were referred to arbitration ; the costs of the action, and of the reference and award, to abide the event of the award.

The arbitrator made his award on the 20th day of October, 1844, in the following terms, after reciting the submission :—"I do find that the said Joseph Caldwell Williamson had good cause of action against the said John Bernard Locke, in respect of the matters mentioned in the second count of the declaration in the said action, and I award and determine that the said J. C. Williamson is entitled to recover the sum of 297*l.* 16*s.* 6*d.*, for damages on that count. And I direct that sum to be paid by the said J. B. Locke, to the said J. C. Williamson. And I further award, that the said J. C. Williamson had no cause of action against the said J. B. Locke, in respect of the matters mentioned in the first and third counts of the said declaration."

A rule had been obtained, on behalf of the defendant, in Michaelmas Term, to set aside this award, on the ground that there had not been a final decision on all the matters submitted, inasmuch as the cause and all the issues had not been sufficiently decided, so as to enable the costs to be taxed ; which rule had afterwards been discharged.

Martin, in the present Term, on behalf of the plaintiff, moved for a rule, calling on the defendant to shew cause why the Master should not tax the plaintiff his costs in this cause; upon the plaintiff allowing the costs of the first and third counts, and of all the issues relating to the first and third counts in the declaration, to be taxed for the defendant. An application has been made to the Master to tax the costs; but he felt a difficulty in consequence of a decision of *Bourke v. Lloyd (a)*, which was brought before his notice; and according to which, he conceived, the award, in this case, to be bad for not finding specifically on each issue. That case, however, is clearly distinguishable; for in that there were several counts in the declaration, and the arbitrator found that the plaintiff had good cause of action against the defendant, and that the defendant should pay to him 20*l.*, with the costs of the action. It, therefore, did not appear clearly in respect of which counts the arbitrator held that the plaintiff was entitled to recover. Here, however, the arbitrator finds that the plaintiff has a good cause of action against the defendant, in respect of the matters mentioned in the second count, and awards a certain sum, by way of damages, on that count. To that count, the defendant pleaded four pleas, all of which go to the whole cause of action contained in that count. It, therefore, is clear that on all the issues on that count, the arbitrator has found for the plaintiff; for if any one had been found for the defendant, the plaintiff could not have recovered in respect of that count. With respect to the first and third counts, and the issues thereon, the arbitrator has specifically found that the plaintiff is not entitled to recover in respect of them; and if, indeed, there be any doubt from the case of *England v. Davison (b)*, whether the finding on these issues is sufficiently specific to entitle the defendant to the costs upon

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(a) 10 M. & W. 550; See S. C. 2 Dowl. 452, N. S.

(b) 9 Dowl. 1052.

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them; the plaintiff is willing to waive the benefit of any such objection by consenting that the whole of the costs on those issues, shall be taxed for the defendant; the plaintiff, of course, being only entitled to such portion as fall within the description of general costs in the cause. This is the proper course, as was pointed out by Mr. Justice *Coleridge*, in the case above referred to. The time has past in which the defendant can apply to set aside the award. This rule is only a step to further proceedings. In itself it cannot, in any way, injure the defendant. He cited, also, *Waddle v. Downman* (a).

A rule nisi having been obtained,

Cowling, shewed cause. The defendant shews, by his affidavit, that the rule nisi to set aside the award, was only discharged on technical grounds. This is not an application to the Master to review his taxation; but is, in substance, to amend the award, which the Court have no power to do. It is clear that as respects the finding on the issues on the first and third counts, the award is bad for not finding specifically on each issue; and the plaintiff seeks to remove the difficulty by offering to waive any objection on the bad part of the award, and so induce the Court to enforce such portion as is good. He cited *Lund v. Hudson* (b).

Martin, in support of the rule. The Court of Exchequer have just decided in the case of *Kilburn v. Kilburn* (c), that where there are pleas of payment and set-off, and the award is, in substance, that the defendant should pay a specific sum, and that judgment should be entered for the plaintiff for that amount, that that award determines sufficiently those two issues. The present application is

(a) *Ante*, vol. 1, p. 560; See
 S. C. 12 M. & W. 562.

(b) *Ante*, vol. 1, p. 236.

(c) Since reported, *ante*, p. 633.

not to enforce payment of these costs; but merely to ascertain their amount.

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WILLIAMS, J.—It is time that it should be definitely settled whether, when a cause is submitted to arbitration, in which there is, for instance, only a single count, and several pleas to that count, each of which is an answer to it, it is not sufficient if the arbitrator finds that the plaintiff has a good cause of action without finding specifically on each issue.

But I am not called on to decide this point. All that I am asked in this case to do, is to order the Master to tax the plaintiff's costs upon the plaintiff's allowing the costs of the first and third counts, and of all the issues relating to the first and third counts, to be taxed for the defendant. Should the Master, by taxing these costs, in consequence of my making such an order, commit an error, the taxation may be reviewed, and then the propriety of this rule, and the taxation under it, be considered. If the argument of Mr. *Cowling* be correct, and this award be bad, the present step can in no way prejudice the defendant; as, by submitting to this rule, he is not called upon to pay anything, or to do anything in consequence of the award. This is merely a necessary step to put the matter in train for being carried further. I therefore see no inconvenience that can result from my making the rule absolute.

Rule absolute.



1845.

SIMMONS v. KING.

(In the full Court.)

Where, under a Judge's order, an amendment of the record was made, on payment of costs: *Held*, that the party, receiving those costs, was precluded from moving to rescind the order.

AN order of Mr. Justice *Wightman*, for amending the record in this cause, after error brought, by striking out from the commencement of the declaration the recital of the writ of summons, had been made at the instance of the plaintiff, on the payment of the costs "of, and occasioned by, the amendment." These costs had been taxed, and paid to the defendant's attorney, on the first day of the present Term.

Pashley had obtained a rule nisi for rescinding the above order (a); citing *Green v. Miller* (b).

W. H. Watson and *Cleasby* shewed cause. This application is made too late, after the costs of the amendment have been taxed and received by the defendant; *Kennard v. Harris* (c).

Pashley, in support of the rule. In *Kennard v. Harris*, the matters in dispute between the parties were referred, by an order of *Nisi Prius*, to the award of the arbitrator, on the terms of the defendant paying the costs of the cause, and of the reference and award. The plaintiff, after having accepted the costs of the reference and of the award, was dissatisfied with the award; and the Court held that he was precluded from moving to set it aside. There the order referring the cause to arbitration must have been made with the consent of the defendant. Here the order is made in invitum; and if the Judge had no power to

(a) On the 14th of January.

(b) 2 B. & Ad. 781.

(c) 2 B. & C. 801; See S. C. 4 D. & R. 272.

make it, as it is submitted he had not, the defendant could not render it valid, by accepting these costs.

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Lord DENMAN, C. J.—The defendant, having received these costs under a Judge's order, cannot now come and dispute the validity of the order. In *Kennard v. Harris* (a), the award might have been bad, and yet the party receiving the costs under it, was held to be precluded from taking any objection to its validity. The same principle applies in the present case.

Rule discharged, with costs.

(a) 2 B. & C. 801 ; See S. C. 4 D. & R. 272.

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BOWKER and Another, Assignees, &c. of POTTER v.
TEBBUTT.

AN action had been brought by the plaintiffs, as assignees of one Potter, a bankrupt, to recover the value of certain letters patent, alleged to have been fraudulently assigned by him to the defendant.

At the Summer Assizes for Liverpool, 1844, when the cause came on for trial, the parties consented to the following order, which was afterwards made a rule of Court.

“ By consent of the parties, their counsel and attorneys, it is ordered by the Court, that the last juror empannelled and sworn to try the issues in this cause be withdrawn, and

In an action by the assignees of a bankrupt to recover the value of certain letters patent alleged to have been fraudulently assigned by the bankrupt to the defendant, an order of Court was made, to which one W. J. became a party, direct-

ing that a juror should be withdrawn, and that a suit in equity between the parties be dismissed, that the defendant and W. J. should abandon their claim to the patents, that the patents and assignments to the defendant should be given up, and that the defendant should execute an assignment of one of the patents on demand to the plaintiffs : also that the plaintiffs should pay to W. J. 750*l.*, and to the defendant 100*l.* ; and that W. J. be allowed to execute orders on hand to the extent of ten thousand spindles, without paying the patent right, and ten thousand more on paying 4*d.* per spindle : also that the defendant do pay to W. J. the sum of 750*l.*, and also 4*d.* a spindle, patent right, upon ten thousand spindles ; that W. J. do, at the expense of defendant, release all claims against him ; and that the defendant do pay to W. J. all costs necessarily incurred on occasion of this rule or order : *Held*, on motion for an attachment against the plaintiffs for not paying the 100*l.* to defendant, that the various acts to be performed by the defendant and W. J. were in the light of positive directions ; and not of conditions precedent, the performance of which the defendant was bound to allege, in order to entitle himself to the attachment.

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 {
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that the suit in equity, wherein Thomas Tebbutt is complainant, and James Potter, Richard Potter, Michael Potter, George Potter, William Potter, Joseph Bowker, James Whitelegg, and William Jenkinson, are defendants, be dismissed as against all the defendants without costs. And it is also ordered, by and with such consent as aforesaid, that the said Thomas Tebbutt, and also one William Jenkinson, present here in Court, and consenting to become a party to this rule or order, shall abandon all claim to both the patents; and that the patents and the assignment thereof to the defendant be given up, and that the defendant shall execute to the plaintiffs on demand an assignment of the patent for the first invention. And it is also ordered, by and with such consent as aforesaid, that the plaintiffs do pay to the said William Jenkinson, the sum of 750*l.* in full satisfaction of all claims and demands whatsoever, and that the plaintiffs do pay to the defendant the sum of 100*l.* for expenses. And it is also ordered, by and with such consent as aforesaid, that the said William Jenkinson be allowed to execute orders now on hand to the extent of ten thousand spindles, without paying the patent right, and ten thousand more on payment of 4*d.* a spindle. And it is also ordered, by and with such consent as aforesaid, that the defendant do pay to the said William Jenkinson, the sum of 750*l.*; and also 4*d.* a spindle patent right, upon ten thousand spindles; and that the said William Jenkinson do, at the expense of the defendant, release all claims against the defendant; and that the defendant do pay to the said William Jenkinson, all costs necessarily incurred by him on occasion of this rule or order."

The defendants having obtained (a) a rule nisi for an attachment against the plaintiffs, for not paying the sum of 100*l.*, as directed in the order, on an affidavit stating a personal demand, and a service of the copy of the rule of Court, the original being at the same time shewn :

(a) In Michaelmas Term.

Knowles, now shewed cause. The defendant does not shew that he has performed the conditions which this order of the Court imposed upon him; and as this is an application to the discretion of the Court, they will not permit him to come here and ask for an attachment against the opposite party for not complying with the order of the Court, when he does not himself shew that he has performed what he was enjoined to do. It is submitted, that the defendant should have shewn that he had done all the various things which he is required to do by the order, and which are clearly the conditions on which this money is payable to him.

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Cowling, in support of the rule. The acts to be performed by the defendant are clearly not conditions precedent. All that relates to this action is, that a juror should be withdrawn, and that the plaintiffs should pay to the defendant 100*l*. It is true there are several other things to be done with respect to *Jenkinson*; but none of them affect that which the plaintiffs are ordered to do with respect to the defendant. The defendant is only bound to execute an assignment of the patent on demand. It could not be necessary for him in his affidavit to swear to his readiness to do so.

WIGHTMAN, J.—It seems to me, that looking at the order, these are positive directions and not conditions precedent. There is nothing to make the one consequent on the performance of the other. There is no time mentioned for the payment of the 100*l*., and therefore it must be taken to be payable immediately. This has not been done, although there has been a proper service of the rule, and a demand of the payment of the money. The rule must, therefore, be made absolute; the attachment, however, will not issue for a fortnight.

Rule absolute accordingly.

1845.

FOSTER v. The GOVERNOR and COMPANY of the BANK
of ENGLAND.

(In the full Court.)

A plaintiff, suing in formâ pauperis, who is desirous of amending his pleadings, is not entitled to do so as a matter of right, without payment of costs.

PEARSON had obtained a rule, calling on the defendants to shew cause why the plaintiff, who had been admitted to sue in formâ pauperis, should not be at liberty to amend her declaration, without payment of costs. The declaration was in case, for not paying to the plaintiff certain dividends, on certain stock of the three-and-a-half per cent. annuities, standing in the books of the Bank of England, in her name; and the defendants had specially demurred to the declaration, on various grounds. There was an affidavit by the plaintiff, that, in July, 1838, a sum of about 435*L*, was standing in her name, in the new three-and-a-half per cent. consols, in the Bank of England, and that she had never disposed of the same, or authorized any other person whatever to dispose of the same; and that the dividends arising therefrom had been illegally detained from her by the defendants.

Bovill shewed cause. The statutes 11 Hen. 7, c. 12, and 23 Hen. 8, c. 15, s. 2, certainly exempt a pauper from the ordinary costs of the cause. But the Court has power to impose costs upon paupers for vexation or delay; *Vin. Abr.* tit. "*Pauper*," (C. 3, 4, 5.); *Doe dem. Lindsey v. Edwards and Others* (a); *Wilkinson v. Belcher* (b). The rule of Hilary Term, 2 Wm. 4, r. 110, in empowering the Courts to make the pauper pay costs, in the instances therein named, without his first being dis-paupered, does not create a new power. In the case of *Pratt v. Delarue* (c), it is true that

(a) 2 Dowl. 471.

(b) 2 Brown. Ch. Ca. 272.

(c) 10 M. & W. 509; See S. C. 2 Dowl. 322, N. S.

the Court seem to have thought that it did; but the older cases were not brought before their notice. But, however that may be, in the present case, the Court clearly have the power to order costs to be paid; for this is an application for an indulgence; and the only question is, on what terms it will be granted.

1845.
FOSTER
v.
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Pearson, in support of the rule. The construction to be put upon the statutes 11 Hen. 7, c. 12, and 23 Hen. 8, c. 15, s. 2, is, that any party admitted to sue in formâ pauperis, is entitled to take all the steps necessary for the prosecution of his claim, without payment of any fees or costs whatever. The Court, it is true, may order him to be punished, if they think his conduct vexatious; but they cannot order him to pay costs; *Munford v. Pait* (a); *Anonymous* (b).

Lord DENMAN, C. J.—As this is claimed as a matter of right, it is necessary that we should say, that we have no doubt that a pauper plaintiff is not entitled, as of right, to an amendment, without paying the costs attendant upon it. We shall therefore discharge the rule; at the same time we do not doubt that the defendants will follow our recommendation, which is, that, in this instance, the amendment should be allowed, without payment of costs.

Rule discharged.

(a) 1 Sid. 261; See S. C. 1 Keb. 913.

(b) 2 Salk. 506.



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SHORT v. STONE.

(In the full Court.)

The declaration stated a promise to marry on request, and averred a request, with a breach, that the defendant did not marry when so requested, and that he married another person. The defendant, amongst other pleas, traversed the request :
Held, an issuable plea.

DECLARATION on promises. That in consideration that the plaintiff, at the request of the defendant, had then promised the defendant to marry him, he the defendant then promised the plaintiff to marry her, within a reasonable time next after the defendant should be thereunto requested by the plaintiff. That although the plaintiff afterwards, &c., requested the defendant to marry her the plaintiff, and then tendered and offered to marry him the defendant ; and although a reasonable time from the making of such request for the defendant to marry the plaintiff had elapsed, before the commencement of this suit. Yet that the defendant, not regarding his said promise, did not, nor would, when he was so requested, or within such reasonable time as aforesaid, or at any other time, marry the plaintiff; but hath hitherto wholly neglected and refused so to do. And the plaintiff further saith, that the defendant, further disregarding his said promise, after the making thereof, and after such request as aforesaid, and before, &c., to wit, on, &c., wrongfully and injuriously married a certain other person, to wit, one, &c., contrary to his said promise, to the plaintiff's damage, &c.

The defendant being under terms to plead issuably, had obtained an order from Mr. Justice Patteson, to plead the following pleas :

First, non-assumpsit.

Secondly, that the plaintiff did not request the defendant to marry her, nor tender or offer to marry him the defendant, in manner and form as in the said declaration is alleged.

Thirdly, that the contract was mutually rescinded before breach.

The plaintiff signed judgment, as for want of a plea, on the ground that the second plea was not an issuable plea. The defendant obtained a summons, before a Judge at Chambers, to set aside the judgment, as irregularly signed; and after hearing the parties, Mr. Justice *Wightman* made an order to that effect.

A rule nisi having been obtained to rescind the learned Judge's order,

Butt shewed cause. This plea is not only an issuable plea, but a perfectly good one. The plaintiff, by alleging a request to the defendant to marry her, has made it a material averment, which the defendant was entitled to traverse. The defendant was not bound to confine the plea to so much of the declaration as alleged a request. It relates to both parts of the breach. If a request were necessary, and the plaintiff has treated it as being so, then the right of action would only accrue from the time of the request being made; *Thorpe v. Booth* (a).

Peacock, in support of the rule. The request is immaterial. The declaration would have been sufficient, without any averment of request. [*Coleridge*, J.—Must not a request be made, before an action can be maintained?] It is alleged, that he has since married another woman; *Harrison v. Cage* (b). [*Patteson*, J.—If the defendant had merely traversed the marriage to another woman, would that have been a sufficient answer to the action?] If the defendant, by since marrying another woman, had at one time put it out of his power to marry the plaintiff; the law will not presume that he has ever again re-acquired that power; *Ford v. Tiley* (c).

Lord DENMAN, C. J.—It appears to me, that the plain-

(a) R. & Moo. 388; See S. C. nom. *Thorpe v. Coombe*, 8 D. & R. 347.

(b) 1 Lord Raym. 386; See S. C. 1 Salk. 24.

(c) 6 B. & C. 325; 9 D. & R. 448.

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tiff has brought this difficulty upon herself, by alleging a request. If she had confined herself to the statement that the defendant had since married another person, that would seem, according to the argument which has been pressed upon us, to be a sufficient breach, without averring a request. But she has chosen to go on to allege a request, and must therefore take the consequences of so doing. Suppose, in an action for not delivering goods, the purchaser should allege that the defendant did not only not deliver them, but threw them into the sea? He surely would not be permitted to make both these allegations, and then to turn round, and say the first was not traversable. So in the present case, I think, the plaintiff having added a request, cannot well contend on the present motion that it is not material. I therefore think that the plea is issuable, and the rule must be discharged.

PATTESON, J.—I also am of opinion that this plea is an issuable one. The declaration alleges a promise and a breach, but afterwards goes on to add another breach. I do not think that this latter breach can render the traverse of the first breach not issuable.

COLERIDGE, J., and WIGHTMAN, J., concurred.

Rule discharged (a).

(a) The declaration was afterwards amended by striking out the allegation of a request having been made. Upon which the defendant pleaded "that he was not at any time before the commencement of the suit requested

by the plaintiff to marry her according to his said promise." To this plea the plaintiff demurred, and the case now stands over for argument. (Trinity Vacation, 1845.)

COURT OF COMMON PLEAS.

Hilary Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

BENTLEY v. GOLDTHORP and Another.

1845.

CASE for the infringement of a patent, granted on the 21st of December, 1841, to one William Carr Thornton, for certain improvements in machinery, or apparatus for making cards for carding cotton, and other fibrous substances.

In an action for the infringement of a patent, the declaration alleged that the patentee, within six months of the date of the letters patent, in pursuance of the proviso of the proviso within the said letters patent contained, did, by an instrument in writing, &c., particularly describe and ascertain the nature of his invention, and cause the same to be duly enrolled. The defendant pleaded that the patentee "did not particularly

The declaration, which was in the usual form, after setting out the letters patent, (the date of which was laid under a videlicet,) stated that in the letters patent was contained a proviso, that if the said W. C. Thornton should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing, under his hand and seal, and cause the same to be enrolled in her Majesty's High Court of Chancery, within six calendar months next and immediately after the date of the said letters patent, &c., then the said letters patent should become void, &c., as by the enrolment of the said letters patent now remaining of record in her said Majesty's High Court of Chancery,

describe and ascertain the nature of the said alleged invention, and in what manner the same was to be performed, according to the meaning of the said letters patent;" concluding with a verification: *Held*, upon special demurrer, that although it did not appear on the face of the declaration that the six months from the date of the letters patent had elapsed, the averment in the declaration was a material one; and that the plea was, in substance, the same as if it had denied the averment modo et formâ, and, therefore, ought to have concluded to the country.

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reference being thereunto had, would, amongst other things, more fully and at large appear. The declaration then alleged that the said W. C. Thornton did afterwards, and within six calendar months next immediately after the date of the said letters patent, to wit, on the 21st of June, 1842, in pursuance of the said proviso, and of the said letters patent, by an instrument in writing, under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be and might be performed, and did afterwards, and within six calendar months next immediately after the date of the said letters patent, to wit, &c., cause the said instrument in writing to be duly enrolled in her Majesty's High Court of Chancery at Westminster, as by the record of the said instrument in writing now remaining of record in the said Court fully appears. The declaration then averred, in the usual form, that Thornton had assigned his patent right to the plaintiff, and that the defendants had infringed the patent.

Seventh plea.—That the said W. C. Thornton did not particularly describe and ascertain the nature of the said alleged invention, and in what manner the same was to be performed, according to the meaning of the said letters patent. Verification.

Special demurrer, assigning for causes, amongst others, that the plea neither traversed, nor confessed and avoided any material averment of the declaration; that it was uncertain whether the defendants intended to traverse the averment in the declaration, or to confess and avoid the same, by virtue of some new matter; that, if the former were intended, the plea should have concluded to the country, and not with a verification; if the latter, the new matter should have been set out in the plea: that the plea was informal, inasmuch as it tended to raise a question of law as to the sufficiency of the specification enrolled, and yet did not set out the said specification, or any part thereof; that the averment in the declaration being

material and traversable, the defendants, if they intended to maintain the contrary thereof, should have duly traversed the same; that it was a circuitous and argumentative traverse of a material allegation; that the plea did not shew what was the meaning of the letters patent; and that it was a circuitous and argumentative traverse of the compliance with the condition and proviso averred to have been performed and complied with.

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Channell, Serjt., in support of the demurrer. In *Muntz v. Foster* (a), which was also an action for the infringement of a patent, it was decided, that a compliance by the patentee with the proviso, was a material and necessary allegation in the declaration; and therefore a traverse of such an allegation ought to conclude to the country. [*Maule*, J.—The plea is not a traverse of the allegation modo et formâ; but that Thornton did not describe the invention “according to the meaning of the said letters patent.” That looks more like a demurrer than a plea.] If it were so intended, the defendants ought to have concluded to the Court. Another objection to the plea is, that it is uncertain whether it is meant to traverse the allegation in question, or to confess and avoid it by the force of some new matter. If the latter, no new matter is alleged. [He was then stopped by the Court.]

Manning, Serjt., (*J. Addison* with him,) contra. This plea may be supported on two distinct grounds. Even if the plea ought not to have concluded with a verification, the verification may be rejected as surplusage, as no conclusion at all is required. At common law, it ought to have concluded with a prayer of judgment, which the new rules of pleading have rendered unnecessary. In *Bodenham v. Hill* (b), which was an action of assumpsit for work and labour as an attorney, the defendant pleaded non

(a) *Ante*, vol. 1, p. 737; See S. C. 7 Scott. N. R. 471.

(b) 7 M. & W. 274; See S. C. 8 Dowl. 862.

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assumpsit *infra sex annos*, and concluded with a prayer of judgment, omitting the verification. Upon special demurrer, the Court held that the plea was good. In the present case, the allegation of compliance with the condition of the proviso, does not come with propriety from the plaintiff; because, if there be a condition at all, it is a condition subsequent, not precedent. It was for the defendants to aver non-performance; 1 *Williams Saund.* 234, n. 5; *Wynne v. Wynne* (a). [*Maule, J.*—If the allegation in the declaration is immaterial, the plea introduces new matter, and ought to conclude with a verification. In the plea of the Statute of Limitations, an averment that the promise was not made within six years, is a negative of something material in the declaration.] Farther, it does not appear from the declaration, that the six months allowed for the enrolment of the specification, had expired, before the commencement of the action, so that there was no necessity to aver the performance of the condition. Secondly, the plea is not a mere traverse of the proposition in the declaration, but extends much wider. The declaration states, “that the patentee did describe the nature of his invention, and in what manner the same was to be performed,” whereas the plea says that he “did not describe, &c., according to the meaning of the said letters patent.” The plea denies, therefore, not only the mode of enrolling the specification, as alleged in the declaration, but all other modes whatsoever; and, consequently, concludes properly with a verification. [*Maule, J.*—To make the plea good, it must be taken with reference to the proviso. Now, the proviso says, that the nature of the invention shall be described by an instrument in writing, under the patentee’s hand and seal, to be enrolled within six calendar months after the date of the letters patent. The plea, therefore, denies the due enrolment of such an instrument. *Erle, J.*—The declaration follows exactly the words of the proviso throughout.] The defendants must, then, take their stand

(a) 2 M. & Gr. 8; See S. C. 2 Scott, N. R. 278.

upon the first objection alone. In actions on awards, if the plea be, that no award was made, the plea concludes to the Court, and not to the country, so that the plaintiff may have the opportunity of setting out the award in his replication.

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Channell, Serjt., in reply.

Cur. adv. vult.

The judgment of the Court was delivered (in Hilary Vacation) by

TINDAL, C. J.—The question in this case is, whether the seventh plea ought to have concluded to the country. The question depends on the consideration whether the averment in the declaration, which that plea in form denies, was a material averment on the part of the plaintiff; for, if material, it follows, from the ordinary rules of pleading, that as the plea distinctly denies it, there could have been no other issue raised by the plea compelling the plaintiff to plead over, and, consequently, the defendants were bound to have concluded their traverse to the country. And we are of opinion that the averment in the declaration is material.

The first objection taken was that the proviso or condition contained in the letters patent, is a condition subsequent only, and that the plaintiff was under no necessity to allege a performance of it, but that the allegation of non-performance must come properly from the other side. The obvious meaning of this condition appears to us to be, that if the grantee of the letters patent lets the six months elapse without enrolling the specification, the letters patent would cease, determine, and become void, if not from the date of the letters patent, at all events, from the expiration of six months. This objection, however, has been already decided by the Court in the case of *Muntz v. Foster* (a).

(a) *Ante*, vol. 1, p. 737.

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It was, secondly, objected, for the defendants, that as it does not appear, on the face of the declaration, that the six months allowed for enrolling the specification had actually expired before action brought, so there could be no necessity for the averment that the specification had been enrolled. But we think it a sufficient answer to this objection to say, that if this averment were omitted, the plaintiff's right to sue, as assignee of the patent, would be left in doubt and uncertainty; inasmuch as it would neither appear that the six months had elapsed, and that the specification had actually been enrolled; nor that the action was brought for the breach of privilege granted, within six months next following the date of the letters patent. The declaration, in that case, might have been demurred to, and might have been held bad for uncertainty; and we, therefore, think that an averment, which prevents that consequence, cannot be considered as immaterial.

It was lastly argued, that the conclusion of the pleas with a verification, was proper in this case, inasmuch as the traverse is larger than the allegation in the declaration, namely, as it contains a denial that the plaintiff ever did, at any time, particularly describe the invention, and is not pleaded *modo et formâ*, so as to meet the particular averment in the declaration. But to this it appears an answer, that it is alleged in the plea that the grantee of the letters patent did not particularly describe and ascertain the nature of his invention, according to the meaning of the said letters patent. And, in referring to the declaration, it appears that the specification is therein alleged to have been drawn and enrolled in pursuance of the said proviso in the letters patent contained; which is, upon the face of it, according to the meaning of the said letters patent: so that, in substance, the plea is the same as if it denied the averment *modo et formâ*. We, therefore, think that the plea ought, properly, to have concluded to the country, and that there must be

Judgment for the Plaintiff.

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BENZAIECH v. BESSETT.

CHANNELL, Serjt., shewed cause against a rule, which had been obtained on a former day, calling upon the plaintiff to shew cause why he should not give security for costs, he being a foreigner, resident at Bourdeaux, beyond the jurisdiction of this Court. The action had been originally commenced against the London Dock Company, to recover the possession of a large quantity of wine warehoused at the London Docks. The London Dock Company, having no claim to the wine themselves, obtained an interpleader rule, by which the present defendant, Jacques Bessett, was made defendant in their stead. The company had made no application for security for costs before the interpleader rule was obtained, nor had the present defendant pleaded to the action when this application was made on his behalf. There was no affidavit that the defendant had a good defence on the merits. It was now submitted, on the part of the plaintiff, that as the party against whom the action had been commenced, had not applied for security, the case did not fall within the ordinary rule.

A party, made defendant under an interpleader rule, is entitled to demand security for costs from a plaintiff residing beyond the jurisdiction of the Court.

Byles, Serjt., contra, contended, in the first place, that there was no necessity for an affidavit of merits; and cited *The Edinburgh and Leith Railway Company v. Dawson* (a). Secondly, he argued, that as the defendant now stood in the same position as if the action had been originally commenced against him, there was no reason for dispensing with the ordinary rule, by which plaintiffs, out of the jurisdiction of the Court, were called upon to give security for costs.

(a) 7 Dowl. 573.

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TINDAL, C. J.—It seems to me that the defendant stands in the same position as any other defendant, and is entitled to the security for which he applies.

MAULE, J.—I think the same mischief exists in this case as in any other, and the proper remedy is, that the plaintiff should give security for costs.

Rule absolute.

WALTON v. CHANDLER.

A defendant, intending to execute a warrant of attorney, went to the office of the attorney for the plaintiff, where he found another attorney, W. J. M., (the brother of the plaintiff's attorney.) The plaintiff's attorney then read over a form of words (contained in the warrant of attorney) which the defendant repeated after him, stating that he, defendant, had nominated W. J. M. as his attorney: *Held*, that this was an express naming of an attorney by the defendant, within the meaning of the stat. 1 & 2 Vict. c. 110, s. 9.

A RULE had been obtained by *Channell*, Serjt., calling on the plaintiff to shew cause why the warrant of attorney given by the defendant, and the judgment and execution thereon, should not be set aside; upon the ground that the attorney attesting the execution of the instrument by the defendant, had not been named by him, pursuant to the statute 1 & 2 Vict. c. 110, s. 9. It appeared from the affidavits, that the warrant of attorney had been prepared by Mr. Edward Meymott, the plaintiff's attorney, and that the plaintiff and the defendant went together in company to Mr. Meymott's office, for the purpose of executing it. When the plaintiff and the defendant arrived at the office, they found Mr. Edward Meymott there, and Mr. W. J. Meymott, his brother, also an attorney, but not connected with him in business. Mr. Edward Meymott explained to the defendant the necessity there was for the attendance of an attorney on his part, to witness the execution of the warrant of attorney, and informed him that he had therefore requested his brother to be present, in order that the defendant might, if he thought proper, appoint him his attorney for that purpose. The defendant did not object to this proposition, and repeated after Mr.

Edward Meymott, the plaintiff's attorney, the following words, taken from the body of the warrant: "And I, the said Thomas Chandler, have expressly named William Joseph Meymott, of 86, Blackfriar's Road, in the county of Surrey, gentleman, an attorney of her Majesty's Court of Common Pleas at Westminster; and requested him to attend on my behalf, to inform me of the nature and effect hereof before the same is executed, and to witness the due execution hereof by me; and I acknowledge that the said William Joseph Meymott has accordingly informed me of the nature and effect hereof before such execution." The warrant was then executed and attested by Mr. W. J. Meymott, as the defendant's attorney. On the 26th of November, judgment was signed and execution issued; and on the 19th of December, a fiat in bankruptcy was sued out against the defendant, by whose assignees the present application was made.

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Talfourd, Serjt., now shewed cause. It is admitted that Mr. W. J. Meymott did not originally attend at his brother's office at the request of the defendant; but that was not necessary, if the party about to execute the warrant of attorney adopted the suggestion made to him, that Mr. Meymott should act as his attorney; *Taylor v. Nicholls* (a), *Hale v. Dale* (b). Where there has been an express and formal naming of the attorney, and no fraud is suggested, that is sufficient.

Channell, Serjt., contra. A naming of the attorney by repeating the words of nomination after another, would let in all the mischief which the statute was intended to prevent. That was a mere formal act, not implying that the defendant freely adopted Mr. Meymott as his attorney. He referred to *Barnes v. Pendrey* (c), and *Gripper v. Bristow* (d).

(a) 6 M. & W. 91; S. C.
 8 Dowl. 242.

(b) 8 Dowl. 599.

(c) 7 Dowl. 747.

(d) 6 M. & W. 807; See S. C.
 8 Dowl. 797.

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TINDAL, C. J.—It appears to me that this warrant of attorney has been executed in conformity with the directions of the act of Parliament. The earlier cases upon the construction of the statute, certainly decided that no warrant of attorney would be good, unless there were an original, as well as an express, nomination of the attorney by the defendant; but the latter cases are founded on a better view of the objects of the act, and have laid it down as a rule, that not only where a party is named by the defendant, but where he is adopted as his attorney, it is sufficient. The argument on the part of the defendant is, that, as the nomination was made by repeating words which already appeared on the face of the instrument, there was not a free adoption of the party so named. It really would be very hard to turn a circumstance like this, which was intended to make the transaction the more free from suspicion, into an argument against the validity of the document. In consequence of the objections which have been frequently taken to the execution of these instruments, the creditor, with a view to his own protection, has had an express nomination inserted in the body of the warrant of attorney; and I cannot but think that when this was read over to the party executing, and he repeated the words, the circumstance of its having been found in the document itself, ought not to make any difference. It seems to me, therefore, that there has been a strict and literal compliance with the requisitions of the statute; and in the total absence of fraud, we should be doing very wrong if we were to set this warrant of attorney aside.

MAULE, J.—The statute requires that there should be some attorney present on the behalf of the person executing the warrant of attorney, expressly named by him, and attending at his request. No question has been made, as to whether Mr. W. J. Meymott attended at the request of the defendant; because he was in the room at the same time with him, and if he remained at his request, it comes to

the same thing. But it is contended, that Mr. Meymott was not expressly named by the defendant as his attorney. Now I am of opinion, that where a party says, "I have expressly named William Joseph Meymott, &c.," that this is an express naming of an attorney by the defendant, within the meaning of this act of Parliament. Such a formal proceeding may sometimes induce a suspicion of fraud, but there is no fraud suggested here. The Courts have required such extreme nicety in the forms of executing a warrant of attorney, that there is no security for any creditor, unless there has been a literal compliance with the provisions of the act. That accounts for this form being gone through in a *bonâ fide* case like the present. I think that Mr. Edward Meymott prudently and properly took care to exclude any chance of the defendant's not actually naming an attorney, by using plain, formal words, which, in order to avoid mistakes or equivocation, he read from the instrument itself, and which the defendant repeated after him. By so doing, the defendant named Mr. W. J. Meymott his attorney, just as a person who repeats the words of the oaths after the officer of the Court, takes the oaths of allegiance and supremacy. I am of opinion, therefore, that there has been a literal compliance with all the provisions of the act; and that being the case, I agree with the Lord Chief Justice in thinking that it would require proof of fraud to show that what was a literal, was not also a substantial, compliance with the statute. It is very important that where, as in the present instance, there is an absence of fraud, these warrants of attorney should be sustained.

CRESSWELL, J.—I am of the same opinion. *Primâ facie*, the warrant of attorney is good; and it is for the party who executes it to shew that it is not. Now, what does the defendant say here? He says, that the attorney was brought to the office by the attorney of the plaintiff, and that he, the defendant, did not assent or agree to the employment

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of Mr. W. J. Meymott as his attorney, otherwise than by simply not objecting thereto. He does not swear, therefore, in terms, that he did not name Mr. Meymott, and the affidavits on the other side shew that he did name him. Where, therefore, there has been a precise and literal compliance with the statute, and no fraud is suggested, there can be no ground for setting aside the warrant of attorney.

ERLE, J., concurred.

Rule discharged, with costs.

GIBB v. KING.

A prisoner in the custody of the keeper of the Queen's prison on criminal process, under a conviction of the Court of Queen's Bench, cannot be charged in execution in a civil suit, by a writ of habeas corpus ad satisfaciendum, issuing out of this Court, even since the passing of the stat. 5 & 6 Vict. c. 22.

THE defendant was brought up on the last day of Michaelmas Term by a habeas corpus ad satisfaciendum, directed to the keeper of the Queen's Prison, in order to be charged in execution with a judgment debt of 60*l.* 4*s.*, recovered against him by the plaintiff in this action. The judgment was signed on the 9th of December, 1843. On the 6th of February, 1844, the defendant was convicted, in the Court of Queen's Bench, upon an indictment for a conspiracy, and was sentenced to imprisonment for eighteen calendar months. On the 10th of February, he was taken into custody and confined in the Queen's Prison. On the 22nd of November, the writ of habeas corpus ad satisfaciendum was lodged with the keeper of the prison, who made his return to the writ, setting out the sentence and warrant of the Court of Queen's Bench.

Byles, Serjt., for the defendant, opposed his being charged in execution, and moved for a rule to shew cause why the writ of habeas corpus ad satisfaciendum should not be set aside for irregularity, with costs. He submitted, that when a party was in custody under a criminal charge, a writ of habeas corpus ad satisfaciendum did not lie; and cited

Walsh v. Davies (a), *Jones v. Danvers* (b), and *Freeman v. Weston* (c).

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Sir *T. Wilde*, Serjt., (*amicus curiæ*) said that the practice had generally been, if the defendant objected to being charged in execution, to adjourn the case; and to grant a rule to shew cause why the writ of habeas corpus ad satisfaciendum should not be set aside.

TINDAL, C. J.—Let the case then stand over till the first day of next Term; and, in the meantime, notice of the rule must be given to the plaintiff's attorney.

Rule nisi granted.

Channell, Serjt., now shewed cause against the rule. It may be contended on the other side, in the first place, that the writ was not lodged in sufficient time; but the rule, that a prisoner must be charged in execution within two Terms after final judgment, does not extend to cases where the party is not in custody at the suit of the plaintiff; *Hall v. Wetherell* (d). The main question, however, is, whether the practice which formerly obtained with regard to these writs, has not been altered by the stat. 5 & 6 Vict. c. 22, by the third section of which the Fleet Prison, which was formerly the prison of this Court, is abolished. By the first section, the Queen's Prison is now made the prison of this Court, as well as of the Court of Queen's Bench, and therefore the officer in whose custody the defendant now is, is an officer of this Court. If the defendant be charged in execution in the present suit, there will, consequently, be no change of custody; which was the ground on which the cases, cited in moving for the rule, were decided.

(a) 2 N. R. 245.

(b) 5 M. & W. 234; See S. C.

7 Dowl. 394.

(c) 1 Bing. 221; See S. C.

8 Moore, 81.

(d) 2 Scott, N. R. 196.

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Byles, Serjt., to support the rule. The effect of the writ of habeas corpus ad satisfaciendum in the present case, would be to take the defendant out of custody on criminal process, and to charge him in execution in a civil suit. This Court stands in the same position as the civil side of the Court of Queen's Bench, which, before the passing of the stat. 5 & 6 Vict. c. 22, had no power to charge the defendant in execution when in custody on a criminal process. In that Court, the same officer must have had charge of the prisoner; and the practice was, to have the defendant, when in custody upon a criminal charge, brought up by a habeas corpus issued on the Crown side of the Court; *Taylor's case* (a); *Fowler v. Dunn* (b). As there is no Crown side to this Court, the plaintiff must wait until the expiration of the period of criminal custody.

MAULE, J. (c)—This is a rule to set aside a writ of habeas corpus ad satisfaciendum, which has been sued out of this Court, in order that the plaintiff may charge the defendant in execution. Since the passing of the stat. 5 & 6 Vict. c. 22, the Queen's Prison is the prison of this Court, and therefore the defendant, being in the custody of the keeper of the Queen's Prison, is in the custody of an officer of this Court, and in his custody he would remain, even if he were charged by the plaintiff in execution. There is no attempt, therefore, to change the custody; but the question is, whether a prisoner, under sentence of imprisonment for a misdemeanor has been properly brought here by a writ of habeas corpus ad satisfaciendum, for the purpose of his being charged in execution in a civil suit. Before the stat. 5 & 6 Vict. c. 22, passed, the practice was, when a party was in the criminal custody of the Court of Queen's Bench, to bring him up by a writ issued on the Crown side of

(a) 3 East, 232.

(b) 4 Burr. 2034.

(c) *Tindal*, C. J., was sitting

in the judicial committee of the Privy Council.

that Court, which alone had the power to remand him to criminal custody. There is nothing in the stat. 5 & 6 Vict. c. 22, to alter the former practice of the Queen's Bench, and I should think it very strange if this Court had a greater power than the Civil side of that Court. The writ has, therefore, issued irregularly, and the rule to set it aside must be made absolute.

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CRESSWELL, J.—I am of the same opinion.

ERLE, J.—I also think that the rule should be made absolute. I ground my opinion on the analogy to the practice of the Court of Queen's Bench before the statute.

Rule absolute.

WOOD v. WEDGWOOD.

TRESPASS. The first count stated, that the defendant heretofore, &c., and on divers other days and times between, &c., with force and arms, &c., broke and entered the closes of the plaintiff, situate in the parish of Burslem, in the county of Stafford: that is to say, a certain close called the Church Meadow, and a certain other close called the Garden, and then broke down, prostrated, damaged and destroyed, divers posts, rails, and boards, to wit, 100 posts, &c., of the plaintiff, of great value, to wit, &c., then standing and being in and upon the said closes respectively, and being part of the fences and inclosures thereof; and then also broke down, prostrated, damaged and destroyed, divers, to wit, 20 perches of the hedges and fences of the plaintiff

Trespass quare clausum fregit. The declaration contained two counts, the second of which charged the trespass on other days and times, and on other parts of the closes in the first count mentioned. The defendant pleaded a right of way over the closes in the declaration mentioned. The plaintiff traversed the right of way, and new as-

signed. To the new assignment, there was a payment of money into Court, and acceptance of it: *Held*, that the plea justified all the trespasses in the declaration; and that the defendant, therefore, was not bound to prove two rights of way.

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of and belonging to the said closes respectively, and of great value, to wit, &c.; and then also dug up and subverted the earth and soil, &c., and with feet in walking, trod down, trampled upon, and consumed the grass and herbage thereof.

Second count: that the defendant afterwards, to wit, on, &c., and on divers other days and times between, &c., with force and arms, &c., broke and entered the said closes of the plaintiff in other parts thereof, and then broke down, prostrated, damaged and destroyed, divers, to wit, 100 other posts, &c., of the plaintiff, of great value, to wit, &c., then standing and being in and upon the said closes respectively, and being part of the fences and inclosures thereof; and then also broke down, prostrated, damaged and destroyed, divers, to wit, 20 other perches of the hedges and fences thereof, and dug up and subverted the earth and soil thereof, and trod down, trampled upon, and consumed the grass and herbage thereof.

Plea: that before, and at the several times when, &c., in the declaration mentioned, there was and of right ought to have been, a certain common and public highway into, through, over, and along the said closes in the declaration mentioned, in which, &c.; wherefore, the defendant, &c., (justifying the removal of the posts, &c., because they were obstructing the foot path).

Replication: that there was not nor ought there of right to have been, at the said several times when, &c., or either of them, a common or public highway into, through, over, or along, the said closes, in which, &c., in the declaration mentioned, in manner and form as in the said plea of the defendant is alleged.

The plaintiff also new assigned that he brought his action not only for the trespasses sought to be justified in the plea, but also for other and different trespasses, committed on other and different occasions, and for other and different purposes, and in other and different parts of the said closes

respectively, out of the said supposed way. To this new assignment the defendant pleaded payment of forty shillings into Court, which was accepted by the plaintiff.

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At the trial of this cause at the last Summer Assizes for the county of Stafford, before *Tindal*, C. J., the jury found that the defendant had proved a right of way over the closes in question; but as the learned Judge was of opinion that upon the pleadings, the defendant had undertaken to justify two distinct sets of trespasses, and was therefore bound to prove two separate rights of way, a verdict was taken for the plaintiff, with forty shillings damages, with leave reserved to the defendant to move to enter the verdict for him.

A rule nisi having been accordingly obtained;

Talfourd, Serjt., shewed cause. The plaintiff charges two separate sets of trespasses in his declaration, and the defendant has undertaken to justify them both. He was, therefore, bound to prove two separate rights of way. [*Cresswell*, J.—The trespasses for which the plaintiff brings his action might all be on different parts of the same closes. *Maule*, J.—Is it not the same as if he had charged the trespasses in one count? Is there any difference between this declaration, and saying that the trespasses were committed on divers days and times, and in various parts of the closes? The defendant by his plea says, that all the trespasses were committed in asserting one right of way.] The defendant should have pleaded two separate rights of way; *Ellison v. Isles* (a). The defendant's plea is either commensurate to the trespasses complained of, or it is bad.

Shee, Serjt., in support of the rule, was not called upon.

TINDAL, C. J.—Upon further consideration, I think that

(a) 11 A. & E. 665; See S. C. 3 P. & D. 391.

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the defendant is entitled to the verdict. The second count is altogether idle, and discloses no further cause of action than the new assignment, as to which the plaintiff has already received his damages. If the second count had specified a trespass on a particular close by name, or other description, it would then have been like a separate action; but as it merely states a trespass "in other parts" of the same closes, this is no more than is done by the new assignment.

MAULE, J.—The whole complaint is of a trespass to certain closes in some parts and in others. The defendant pleads that he committed the trespass under a right of way, which he had over the closes in question. The plaintiff denies that he had any right of way, and also new assigns extra viam. To the new assignment, there was a payment of money into Court, which the plaintiff has received in satisfaction of the trespasses new assigned. The only question, therefore, at the trial was, whether the defendant had a right of way over some part of the closes in question; and the jury found that he had.

CRESSWELL, J., and ERLE, J., concurred.

Rule absolute.



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RANKIN v. DE MEDINA.

TRESPASS for breaking and entering plaintiff's dwelling-house, and taking his goods.

Plea, justifying under a writ of *testatum fieri facias*, at the suit of the defendant against the plaintiff.

Replication: That the said writ of *testatum fieri facias* in the said plea mentioned, and under which the defendant attempts to justify the said trespasses, was, to wit, on the said 5th day of February, in the year of our Lord, 1844, irregularly sued and prosecuted out of this honourable Court, and that afterwards, to wit, on the 1st day of April, in the year of our Lord, 1844, by a certain order then duly made in the said cause, by the Right Honourable T. Erskine, one of her Majesty's Justices of this honourable Court, bearing date, to wit, the said 1st day of April, in the year of our Lord, 1844, (and which order was afterwards, to wit, on the day and year last aforesaid, duly made a rule of the said Court); it was ordered, that the said writ of *testatum fieri facias*, issued in the said suit, and the proceedings thereon, should be set aside as by the said rule and order now remaining in the said Court, will more fully appear; and this the plaintiff is ready to verify.

Demurrer to replication, assigning amongst other causes, that it did not appear in or by the said replication, how or in what manner the said writ was irregularly sued and prosecuted out of this Court, and that the nature and ground of the alleged irregularity, ought to have been set forth in the said replication, to enable the Court to judge whether the said writ was or was not irregularly sued or prosecuted out of this honourable Court.

Joinder in demurrer.

Channell, Serjt., in support of the demurrer. The replication is bad. It assumes to answer the defence set up in the plea, and yet fails to do so. It states that the writ of

To a plea justifying a trespass, under a writ of *test. fieri facias*; the plaintiff replied that the said writ was, to wit, on, &c., irregularly sued and prosecuted out of this Court, and was afterwards set aside by an order of a learned Judge, which order was made a rule of Court: *Held*, on special demurrer, that the Court would not intend that it was set aside otherwise than for irregularity; and, therefore, that the replication was good.

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testatum fieri facias, has been set aside by an order of a learned Judge. That may be so, and yet the defence be a good one, if the writ was merely set aside as erroneous. The replication should have shewn on what ground the writ of *fi. fa.* was set aside, so as to have excluded the possibility of the defendant's being able to justify under it. *Riddell v. Pakeman* (a), is an authority that trespass will not lie, where process is irregular merely, and not void. The case of *Prentice v. Harrison* (b), is almost identical with the present. There, in an action of trespass for assault and false imprisonment, the defendant pleaded a justification under a writ of *capias ad satisfaciendum*, and the plaintiff replied that the said writ was after the issuing thereof, and before the commencement of the suit, ordered to be set aside, and was set aside by order of a Judge; and it was held, on special demurrer, that the replication was bad for not averring that the writ was set aside for irregularity. [*Tindal*, C. J.—In that case was there an averment, as in the present, that the writ had irregularly issued?] It does not appear that there was. But here the writ may have been both erroneous and irregular, and the learned Judge have set it aside solely on the former ground.

Byles, Serjt., contra. Here the writ appears on the face of the replication to have been irregularly issued, and it is stated to have been afterwards set aside by order of a learned Judge. The Court will intend that it was set aside, for the only defect mentioned, namely, irregularity. If any assumption is to be made, it will not be that it was set aside for a cause that would render the proceedings under it still valid, for that would be an assumption wholly against the language of the replication.

Channell, Serjt., replied.

(a) 2 Cr., M. & R. 30; See (b) 1 Dav. & M. 50.
 S. C. 3 Dowl. 714.

TINDAL, C. J.—I do not think that this case comes within the decision of the Court of Queen's Bench in *Prentice v. Harrison* (a), for there is here this important difference, that in the commencement of this replication, the plaintiff alleges that the writ of *testatum fieri facias* was irregularly sued out and prosecuted, &c., which does not appear to have been the form adopted in the case cited. That would be a sufficient ground for setting it aside, and it would, therefore, be a violent intendment on our parts, to assume that it was set aside because it was erroneous.

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CRESSWELL, J., and EARLE, J., concurred (b).

Judgment for the Plaintiff.

(a) 1 Dav. & M. 50.

(b) *Maule, J.*, was absent.

NEWTON v. ROE.

THIS was an action for a libel, to which the defendant had pleaded the general issue and several long pleas of justification. At the trial, the jury found a verdict for the plaintiff, and assessed the damages at one farthing. On taxation, the Master conceived the case to be within the 3 & 4 Vict. c. 24, s. 2, and the Judge not having certified according to that section, he refused to allow the plaintiff any costs.

Where in an action for a libel, to which the defendant had pleaded the general issue and pleas of justification, the jury found a verdict for the plaintiff, damages one farthing; and the Judge refused to certify under the 3 & 4 Vict. c. 24, s. 2: *Held*, that the plaintiff was not entitled to any costs.

Sir T. Wilde, Serjt., now moved for a rule for reviewal of the taxation. The words of the stat. 3 & 4 Vict. c. 24, s. 2, are to be construed strictly; *Taylor v. Rolfe* (a). If that be so, it is apprehended that the present case does not come within its terms. That statute enacts, that where any plaintiff "shall recover by the verdict of a jury less damages

(a) 1 Dav. & M. 229.

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than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default." Here the plaintiff recovers only upon the issue of not guilty. On the pleas of justification he recovers nothing. Those pleas are therefore left in the same position as before the statute passed; and, if so, he is entitled to his costs upon them. If there had been a verdict for the defendant on the general issue, and a verdict for the plaintiff on the pleas of justification, he would then, it is submitted, have been entitled to the costs of those pleas. It seems rather unreasonable, therefore, to say, because he has succeeded on the general issue also, he is to be disallowed them. If this is to be the construction put upon the act, a defendant in such a case may place any pleas he likes upon the record, and so harass the plaintiff, by unnecessarily encumbering the record. [*Maule, J.*—That may be a good reason for repealing the act of Parliament; but not for putting any but a plain and rational construction on its terms. *Cresswell, J.*—If the verdict of one farthing damages does not entitle you to costs, what else does?] The verdict on the first issue on which damages are given, is the verdict to which the words of the act would apply. The verdict on the other issues, on the pleas of justification, does not come within the terms of the act, as no damages are found on them. [*Maule, J.*—It is all one verdict.]

TINDAL, C. J.—The question must depend entirely on the construction to be put on the words of this statute. The 2nd sect. enacts [his Lordship here read the words of the section.] The words are general, treating the whole action as the subject-matter of the damages. The words "whether it shall be given upon any issue or issues tried," seem to me to contemplate a case like the present, where upon the whole record, the plaintiff recovers a less sum than 40s.

MAULE, J.—The statute is clear in its terms. There may be some inconvenience as has been suggested, in the defendant's encumbering the record with long pleas which he cannot prove. So, it might be urged, there may be cases, in which a party having sustained an actual damage to the amount of 39*s.*, may suffer considerable hardship, by being deprived by this statute of his right to costs. But the Legislature has thought that to be a less inconvenience than the multiplication of frivolous suits.

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CRESSWELL, J., concurred.

ERLE, J.—It seems to me to be clear that the statute applies to the present case. It was intended to discourage small actions, and although it may act harshly in particular cases, it does so with an object. The statute of Anne, which authorizes several pleas, gives costs in the event of obtaining a verdict on any issue in the cause.

Rule refused.

THOMAS BITTLESTON and JOHN DILLON, Assignees of
WILLIAM TIMMIS, a Bankrupt, v. JOHN TIMMIS.

DECLARATION in assumpsit by the assignees of a bankrupt, for money had and received by the defendant to the use of the plaintiffs as assignees; and for money found

To an action
by the assign-
ees of a
bankrupt for
money had and
received to

their use, as assignees, the defendant pleaded as to 120*l.* &c., that before notice of an act of bankruptcy, and before fiat, he gave credit to the bankrupt by accepting a bill of exchange for 148*l.* 10*s.* for his accommodation, which bill the bankrupt negotiated before notice of any act of bankruptcy, and that the credit so given was of a nature extremely likely to end in a debt; and that afterwards and before the commencement of this action the defendant was obliged to pay the amount of the said bill to the holders; and that before notice, and before fiat, the bankrupt delivered to the defendant certain bills of exchange amounting to 120*l.*, the sum mentioned in the introductory part of the plea, to receive the amounts of the same on behalf of him the bankrupt; and that after the bankruptcy, but before the fiat, the defendant received the amount of the same; and that defendant is willing to set-off and allow out of the sum of 148*l.* 10*s.*, the damages sustained by the non-performance of defendant's promises as to 120*l.* &c.: *Held*, on special demurrer, that the money received by the defendant after the bankruptcy, was properly declared for, as money received to the use of the assignees; that the plea shewed such a mutual credit between the bankrupt and the defendant under the 6 Geo. 4, c. 16, s. 50, as entitled the defendant to plead it by way of set-off under that section in an action by the assignees; that the plea sufficiently confessed and avoided the receipt of the money to the use of the plaintiffs as assignees; and that it did not amount to a circuitous plea of the general issue.

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to be due, on an account stated with the plaintiffs as assignees.

The defendant pleaded, amongst others, the following plea. As to so much of the cause of action in the said first count of the said declaration mentioned, as relates to the sum of 120*l.*, parcel of the moneys in that count mentioned, and as to so much of the cause of action, in the second count of the said declaration mentioned, as relates to the sum of 120*l.*, parcel of the moneys in that count mentioned; the defendant saith, that the said sum of 120*l.*, in this plea first above mentioned, and the said sum of 120*l.* in this plea secondly above mentioned, are one and the same sum of 120*l.*, and not different sums, and that the said account in the said second count of the said declaration mentioned, so far as relates to the said sum of 120*l.* in this plea secondly above mentioned, was stated of and concerning the said sum of 120*l.* in this plea first above mentioned, and not concerning any other or different sum; and the defendant further saith, that before the commencement of this suit, and long before he, the defendant, had notice that any act of bankruptcy had been committed by the said William Timmis, and long before any fiat of bankruptcy issued against the said William Timmis, to wit, on the 4th day of July, A. D. 1843, he, the defendant, gave credit to the said William Timmis in a large amount, to wit, in the sum of 148*l.* 10*s.*, by accepting, for the accommodation of him, the said William Timmis, and at his request, and without any consideration or value given to him, the defendant, for so doing, a certain bill of exchange, in writing, bearing date on the 4th day of July, A. D. 1843, drawn by the said William Timmis upon the defendant, and by which the said William Timmis required the defendant to pay to him, the said William Timmis, or his order, the sum of 148*l.* 10*s.*, which said bill of exchange the said William Timmis afterwards, and before any notice to the defendant of his said bankruptcy, indorsed, negotiated, and transferred for value for his own use and benefit. And the defendant further saith, that the credit so given by him, the

defendant, to the said William Timmis, was a credit of a nature extremely likely to end in a debt from the said William Timmis to the defendant. And the defendant further saith, that afterwards and before the commencement of this suit, to wit, on the 7th day of November, A. D. 1843, aforesaid, he, the defendant, was called upon and obliged to pay, and did pay the said bill of exchange, above mentioned, to certain persons trading under the name, style, and firm of James Browne and Company, and then being the holders of the said bill: and thereupon and thereby, and before the commencement of this action, the said William Timmis became and, at the time of the commencement of this action, was, and still is indebted to the defendant in a large sum of money, to wit, the sum of 148*l.* 10*s.*, being the amount of the said last mentioned bill of exchange for money paid by the defendant for the use of the said William Timmis, at his request, which said last mentioned sum of money, is the same identical sum in and for the amount of which the defendant had given credit to the said William Timmis as aforesaid. And the defendant further saith, that before he, the defendant, had notice of any act of bankruptcy by the said William Timmis committed, and before the date or issuing of any fiat against the said William Timmis, and before the commencement of this action, to wit, on the 17th day of July, A. D. 1843, the said William Timmis delivered to the defendant a certain bill of exchange, bearing date the 17th day of July, A. D. 1843, drawn upon and accepted by one Michael Briggs, for the sum of 100*l.*, payable three months after the date thereof, and a certain other bill of exchange, bearing date the 8th day of July, A. D. 1843, drawn upon and accepted by one Thomas Rose for the sum of 20*l.*, payable three months after the date thereof, which said respective bills of exchange, so accepted as aforesaid, he, the said William Timmis, then delivered to the defendant, as aforesaid, for the purpose and in order that the defendant might obtain and receive the respective amounts thereof for,

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and on behalf, and for the use of him, the said William Timmis. And the defendant saith, that afterwards and after the bankruptcy of the said William Timmis, but before the issuing of any fiat against the said William Timmis, and before the commencement of this action, to wit, on the day and year last aforesaid, the defendant obtained and received the said sum of 120*l.*, being the amount of the said respective bills of exchange; which said sum of 120*l.*, so obtained and received by the defendant as last aforesaid, is the same sum of 120*l.* in the first count of the declaration and in the introductory part of this plea first above mentioned. And the defendant further saith, that the said sum of 148*l.* 10*s.*, so paid by the defendant for the use of the said William Timmis to the holder of the said bill of exchange in this plea firstly above mentioned, and so due and owing from the said William Timmis to the defendant as aforesaid, exceeds the damages sustained by the plaintiffs as such assignees as aforesaid, by reason of the non-performance by the defendant of his said promises as to the said sum of 120*l.* in the introductory part of this plea mentioned, and as to the causes of action relating to which this plea is pleaded. And the defendant is ready and willing, and hereby offers to set-off, and allow to the plaintiffs the full amount of the said damages out of the said sum of 148*l.* 10*s.*, so due and owing to the defendant as aforesaid, according to the form of the statute in that case made and provided. And this the defendant is ready to verify, &c.

To this plea the plaintiffs demurred, assigning the following causes: That the plea neither traversed, nor confessed and avoided the causes of action. That it sought to set-off against the causes of action, a debt due from William Timmis to the defendant before the bankruptcy of William Timmis; and did not shew any debt or sum of money whatsoever to be due and owing to the defendant from the plaintiffs as assignees of the said William Timmis. That it should have shewn, affirmatively, that the said William Timmis delivered to the defendant the said bills of exchange in manner and form as in the said plea mentioned, and,

also, that the defendant obtained and received the said sum of 120*l.*, being the amount of the said bills in manner and form, as in the said plea mentioned, before the bankruptcy of the said William Timmis. That it sought to set-off debts which were not mutual. That it did not sufficiently shew any mutual credit between the bankrupt and the defendant. That it attempted, argumentatively, to deny that the said sum of 120*l.*, in the first count and in the introductory part of the said plea mentioned, was received by him to the use of the plaintiffs as assignees of the said William Timmis. That it amounted to the general issue. That it was double, inasmuch as it argumentatively denied that the said last mentioned sum of 120*l.* was received to the use of the plaintiffs as assignees of the said William Timmis; and also sought to shew matter of set-off to the same cause of action, that is to say, to the same sum of 120*l.*

Joinder in demurrer.

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Channell, Serjt., in support of the demurrer. It is submitted that this plea is bad, as not disclosing a case of mutual credit, within the 6 Geo. 4, c. 16, s. 50; and, also, because it confesses a cause of action by the plaintiffs as assignees, and attempts to avoid it by setting up a debt due from the bankrupt. It has, no doubt, been framed upon the plea in *Hulme v. Muggleston* (a); but, although the plea was held good in that case, it was so held, upon demurrer to the replication, and not, as in the present instance, on special demurrer to the plea itself. [*Maule*, J.—In that case, *Young v. The Bank of Bengal* (b), was not referred to, in which latter case a distinction was drawn between it and *Olive v. Smith* (c)]. *Olive v. Smith* was followed by *Rose v. Hart* (d), where it was held that the statute meant such credit only as must necessarily result in a debt. But even supposing that this were a credit within the meaning of the statute, the cases of *Wood v. Smith* (e)

(a) 3 M. & W. 30; See S. C. 6 Dowl. 112.

(b) 1 Deac. B. C. 622.

(c) 5 Taunt. 56.

(d) 8 Taunt. 499; See S. C. 2 Moore, 547.

(e) 4 M. & W. 522; See S. C. 7 Dowl. 214.

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and *Groom v. Mealey* (a), are authorities that the plea is no answer to an action for money had and received to the use of the assignees. The defendant must either admit or deny this to be money had and received to the plaintiffs' use; if he admit it, then this plea is no answer; if he deny it, then the plea is bad as amounting to the general issue.

Talfourd, Serjt., (with whom was *J. W. Smith*), contra. The case of *Hulme v. Muggleston* (b), is a direct authority on this point. There is a mistake in the marginal note in that case. [*Cresswell*, J.—Yes. It is stated that the defendant obtained the amount of the bill *before* the bankruptcy, whereas the facts of the case shew that it was *after*. There is also a mistake in the pleadings. It is stated that the defendant presented the bill and obtained payment of it from the *drawers* instead of the *drawees*]. In *Russell v. Bell* (c), a plea was held good, which stated that before notice of any act of bankruptcy, and before the issuing of the fiat, and before action brought, the defendant gave credit to the bankrupt by accepting certain bills of exchange for his accommodation, and, at his request, without any consideration or value; which bills were, before notice of the bankruptcy, negotiated by the bankrupt for his own use and benefit; that the credits so given, were likely to end in debts from the bankrupt to the defendant, and that afterwards and before the commencement of the action, the defendant paid the amount thereof. The plea, in those cases, is under the 6 Geo. 4, c. 16, s. 50. The plea, in the present case, is under that statute, as it is extended and amended by the 2 & 3 Vict. c. 29. [*Cresswell*, J.—The statute of 2 & 3 Vict. c. 29, was for the protection of parties trading with the bankrupt. Is this a trading with the bankrupt, or is it not rather a transaction by the defendant as his agent?] The case of *Whitmore v. Robertson* (d) shews that the effect of that statute is to do away with the

(a) 2 Bing. N. C. 138; See 1 Dowl. 107, N. S.
 S. C. 2 Scott, 171. (d) 8 M. & W. 463; See S. C.
 (b) 3 M. & W. 30. 1 Dowl. 135, N. S.
 (c) 8 M. & W. 277; See S. C.

relation to the act of bankruptcy, and substitute for it the issuing of the fiat. The facts here alleged, constitute but one defence; *Lazarus v. Cowie* (a). He cited also *Unwin v. St. Quintin* (b).

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Channell, Serjt., was heard in reply.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court (c). (After stating the pleadings, his Lordship thus proceeded.)—On the argument of this case, two points were mainly relied on for the plaintiffs: first, that the acceptance of a bill of exchange for the accommodation of the defendant, is not a credit within the meaning of the 50th section of the stat. 6 Geo. 4, c. 16; and secondly, that a plea confessing the receipt of money to the use of the plaintiffs as assignees, did not avoid that cause of action by shewing a credit given to the bankrupt, and pleading it as a set-off under that section. We are of opinion that the plea is good. The acceptor of a bill of exchange for the accommodation of another, gives him credit for the amount, which, when paid by the acceptor, would certainly be proveable under a fiat issued against the party for whose accommodation the bill was given and accepted, and may be made the subject-matter of set-off under the mutual credit clause of 6 Geo. 4, c. 16. The cases of *Smith v. Hodson* (d), *Ex parte Boyle* (e), *Ex parte Wagstaff* (f), are distinct authorities for this proposition; and although in the case of *Young v. The Bank of Bengal* (g), some of the cases of mutual credit were treated as not being well decided, the authority of the above mentioned cases was left untouched;

(a) 3 Q. B. 459; See S. C.
2 G. & D. 487.

(b) 11 M. & W. 277; See S. C.
2 Dowl. 790, N. S.

(c) In Hilary Vacation.

(d) 4 T. R. 211.

(e) Cooke's Bank. Law, p. 542.

(f) 13 Ves. 65.

(g) 1 Deac. B. C. 622.

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and the case of *Smith v. Hodson* (a), has since been recognised by the Court of Exchequer in *Hulme v. Muggleston* (b). This plea, therefore, shews upon the one hand a credit for 148*l.*, given by the defendant to the bankrupt before the defendant had notice of any act of bankruptcy, or the fiat had issued. On the other hand, it shews that before the defendant had any such notice, the bankrupt delivered to him two bills of exchange, one for 100*l.*, the other for 20*l.*, in order that the defendant might receive the respective amounts thereof, on behalf and for the use of him the bankrupt, and that the defendant received the same after the bankruptcy and before the fiat. The defendant, therefore, gave credit to the bankrupt, and the bankrupt to the defendant, before the latter had notice of any act of bankruptcy, and before the fiat issued, and these credits have resulted in debts; the one, therefore, may be set-off against the other, by the express words of 6 Geo. 4, c. 16.

But it was contended, secondly, that although the credits were mutual between the bankrupt and the defendant, yet, as the declaration was for money had and received to the use of the assignees, and not to the use of the bankrupt, the debt due to the defendant from the bankrupt could not be set-off, the debt not being due to and from the same parties; and *Wood v. Smith* (c), was cited. The words of the statute, however, furnish an answer to this objection. The plea, indeed, confesses a receipt of money to the use of the assignees, but it shews how their title to that money arises, namely, out of the credit given by the bankrupt: and the 6 Geo. 4, c. 16, s. 50, provides, "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before

(a) 4 T. R. 211.

6 Dowl. 112.

(b) 3 M. & W. 30; See S. C.

(c) 4 M. & W. 522.

the credit given to, or the debt contracted by him, and what shall appear due on either side on the balance of such account and no more, shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set-off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given notice of an act of bankruptcy by such bankrupt committed." Now the assignees are suing for money due to the estate. The defendants state that it was due to the estate, but that there have been mutual credits between the bankrupt and the defendant, before the defendant had any notice of the act of bankruptcy: the one, therefore, may be set-off against the other, by the very words of the section. In the case of *Wood v. Smith* (a), the plea did not shew that there had been mutual credit, or that there were mutual debts between the bankrupt and the defendant, and for that reason it is no authority for the decision of this case. In *Southwood v. Taylor* (b), which was an action for goods sold and delivered by the plaintiff as assignee, where the defendant had pleaded the general issue, and had given notice of a set-off; it was held, by Mr. Justice *Holroyd*, that the defendant was entitled to give in evidence a debt due from the bankrupt before any act of bankruptcy; the sale of the goods mentioned in the declaration having been, in fact, made by the bankrupt after an act of bankruptcy, but more than two months before the date of the commission; a rule nisi was moved for, but refused. It is true that Lord *Ellenborough*, in refusing that rule, after saying that the credit was mutual, and, therefore, that the debt due from the bankrupt was the subject-matter of set-off, expressed an opinion that the plaintiff ought to have declared for goods sold and delivered by the bankrupt; because the transaction being protected by the stat. 46 Geo. 3, c. 135, was as effectual as if no act

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(a) 4 M. & W. 522.

(b) 1 B. & A. 471.

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of bankruptcy had taken place ; and that if he had done so, no objection could have been made to the set-off. Notwithstanding that dictum, however, we think that the plaintiffs in the present case have declared properly for money had and received to their use as assignees, but that their claim is answered by the set-off pleaded.

This disposes of another objection made to the plea, namely, that it is an argumentative denial that the money received by the defendant was received to the use of the plaintiffs as assignees, and, therefore, amounts to a circuitous general issue.

Upon the whole, therefore, it appears to us, that the money received by the defendant after the bankruptcy was received to the use of the plaintiffs as assignees, that he was entitled to set-off against it the amount of the accommodation acceptance paid by him, and that the set-off was properly pleaded by way of confession and avoidance to the plaintiff's cause of action. We therefore think our judgment must be given for the defendant.

Judgment for the Defendant.

NEWTON v. HOLFORD and Others.

To an action of trespass for assault and false imprisonment, one of the defendants pleaded the general issue, and a plea of justification under legal process. The plaintiff replied that the defendant broke open the outer door ; upon which issue

was joined. The jury found a verdict for the defendants on the first issue, and for the plaintiff on the second : *Held*, on motion to review the Master's taxation, that the defendant was entitled to the general costs in the cause.

THIS was an action of trespass for assault and false imprisonment ; to which Healey, one of the defendants, had pleaded the general issue, and a justification, under a writ of *capias ad satisfaciendum* against the plaintiff. The plaintiff joined issue on the first plea, and, to the second, replied that he was in his house, the outer door whereof was closed, and that defendants broke open the outer door. The defendant Healey rejoined, denying the breaking open of the outer door, upon which issue was joined.

At the trial, the jury found for the defendant Healey on the general issue, and for the plaintiff on the plea of justification.

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On taxation, the Master, it appeared, had allowed the plaintiff the general costs in the cause ; and had allowed the defendant Healey only 1*l*. ; on the ground that no more costs were incurred which were exclusively applicable to the general issue.

A rule having been obtained to review the taxation ;

Newton, shewed cause. The ground upon which this rule is moved is, that the defendant Healey is entitled to the general costs of the cause, and not the plaintiff. It is submitted, however, that that is not so. The jury have found upon the second issue, that the defendants did break open the outer door of the house ; and that is, in effect, a verdict for the plaintiff. In the common case of a new assignment (to which the present replication is similar), the plaintiff is always allowed the general costs of the cause.

Talfourd, Serjt., in support of the rule, was not called upon by the Court.

TINDAL, C. J.—If I had entertained any doubt on this subject, I should have been desirous of hearing the other side ; but I am clearly of opinion that this rule must be made absolute. The plaintiff complains, in his declaration, of a plea of trespass for assault and false imprisonment, to which the defendant Healey pleads the general issue. If the case had rested here, and the jury had found a verdict for this defendant, there could have been no doubt whatever that he would have been entitled to the general costs of the cause. But he also pleads a plea justifying under process of law, in answer to which the plaintiff has replied a new collateral fact, which shews the plea not to be sustainable ; namely, the forcing of an outer door of a dwelling-house,

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and the jury have found that the defendant did force the outer door. Now the plaintiff contends that the matter of this plea is to be taken into consideration in considering the effect of the plea of not guilty. But I am of opinion, that the verdict on the plea of not guilty is entitled to the same legal consequences, as if it had not been accompanied by a finding on a plea of special justification. The two pleas are to be kept separate and distinct, and the plaintiff has no right to call in aid the second plea, and the finding of the jury thereon, in order to interpret the finding on the first; nor is he entitled to be in a better position than if the first plea alone had been pleaded. This view is fully established by the case of *Spencer v. Hamerton (a)*, where in an action for a libel, the jury having found for the defendant on the general issue, and for the plaintiff on pleas of justification, the defendant was held to be entitled to the general costs of the cause. The same rule must be adopted here.

MAULE, J.—I am of the same opinion. The defendant is bound to pay the costs of the issue on which he has failed, but he is entitled to the general verdict, and, therefore, to the general costs of the cause.

CRESSWELL, J.—The defendant, by his second plea, admits the trespasses complained of only for the purposes of that issue. There is still the first issue on which the jury find that he did not commit the trespasses.

ERLE, J.—I am of the same opinion. Wherever a defendant succeeds on an issue going to the whole cause of action, he is entitled to the general costs of the cause.

Rule absolute.

(a) 4 A. & E. 413; See S. C. 6 N. & M. 22.



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ASSUMPSIT. For that whereas the plaintiff before and at the time of making the agreement and the promise of the defendant hereinafter mentioned, was lawfully possessed of a certain dwelling-house and premises with the appurtenances, situate in the parish of Saint Marylebone, in the county of Middlesex, as tenant thereof to one William Kynaston Gaskell, for the term of one year from the fourteenth day of October, in the year of our Lord one thousand eight hundred and forty-three; and then carried on the trade or business of a seller of beer in and upon the said premises, and was then also possessed as aforesaid, of certain fixtures, fittings, utensils in trade, beer, stock in trade in and concerning his said trade and business as aforesaid, and other effects then being in the said premises; and thereupon, heretofore and before the commencement of this suit, to wit, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and forty-four, by a certain agreement then made between the plaintiff of the one part, and the defendant of the other part, it was agreed, by and between the plaintiff and the defendant, by and with the privity and consent of the said William Kynaston Gaskell, that the plaintiff should and would give up to the defendant, and let the defendant into possession of the said premises situated as above mentioned, for the residue of the plaintiff's said term therein, and should and would sell, the fittings, fixtures, and utensils in trade, named and contained in a certain inventory, dated the day and year last aforesaid, and then produced and referred to,

Assumpsit; the declaration stated that plaintiff being possessed as tenant of a certain house, and of certain fixtures and stock therein being, it was agreed between the plaintiff and the defendant, with the consent of the landlord, that the plaintiff should let the defendant into possession of the house for the remainder of the term, and should sell him the fixtures, &c., in consideration of a certain sum paid, and a certain other sum of 61*l.* to be paid on a certain day, on which day possession was to be given up. The defendant was to take the stock at a valuation, and certain deductions were to be made from the 61*l.* for rent and taxes which might then be

owing from the plaintiff. And it was agreed that either party who should make default in any of the conditions, or fail to observe the agreement, "should forfeit and pay to the other of them the sum of 30*l.* on demand, to be recovered in any of her Majesty's Courts of law." It then averred, that although the plaintiff was always willing, and offered to let the defendant into possession, and to sell and deliver to him the fixtures and stock, and to allow the deductions agreed on from the 61*l.*; yet defendant would not pay the sum of 61*l.*, or any part thereof, or fulfil the terms of the agreement so to do, or pay to the plaintiff the said sum of 30*l.*, or any part thereof, although often requested: *Held*, on special demurrer, that the breach was well laid as for the non-payment of the 61*l.*; but that if it had been laid specially for the non-payment of the 30*l.*, it would have been ill for not averring a demand.

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by the said plaintiff and defendant respectively, save and except all articles which had been before then erased from the said inventory by one Thomas Hine, for and in consideration of the sum of sixty-five pounds of lawful money of this realm, the sum of four pounds thereof to be paid at the time of signing the said agreement, into the hands of the plaintiff, and the further sum of sixty-one pounds, on the thirtieth day of July then next ensuing, which day had elapsed before the commencement of this suit, thereby completing the amount of the purchase money, together with the amount or value of the said beer and stock in trade, at fair guage; at which time, to wit, on the day and year last aforesaid, possession of the said premises, and the fittings, fixtures, and utensils in trade, should be given up to the defendant, and all rents, rates, taxes, assessments, and other outgoings due and owing by the plaintiff, for and in respect of the said premises, including the costs or value of the repair of all damaged external windows, were to be paid or allowed for, up to the day and year last aforesaid, from which time the defendant was to commence and be liable for the same; and the defendant agreed to take the said premises, and to purchase all the effects above mentioned, for the consideration, and in manner and upon the terms and conditions for and upon which the plaintiff had as aforesaid agreed to let and sell the same; provided, that if either of the said parties to the said agreement should make default, or fail to keep, fulfil, and observe the terms and conditions thereby agreed to be kept, fulfilled, and observed by them respectively, it was then, to wit, on the day and year first aforesaid, further mutually agreed between the plaintiff and defendant, that whichever of them should make such default, or fail to keep, fulfil, and observe the said agreement, should forfeit and pay to the other of them the sum of thirty pounds of lawful British money, on demand, to be recoverable in any of her Majesty's Courts of law; and the said agreement having been so made as aforesaid, afterwards, to wit, on the day and year first aforesaid,

in consideration thereof, and that the plaintiff at the request of the defendant, had then promised the defendant to perform and fulfil the said agreement on his part, the defendant then promised the plaintiff to perform and fulfil the said agreement on his the defendant's part; and the plaintiff says, that he was always from the time of the making the said agreement, until and upon the said thirtieth day of July, ready and willing, and then, to wit, on the said thirtieth day of July, offered to give up to the defendant, and to let the defendant into possession of the said dwelling-house and premises with the appurtenances, for the residue of the plaintiff's term therein, and to sell and deliver to the defendant the said fittings, fixtures, utensils in trade, beer and stock in trade, so agreed to be sold as aforesaid, upon the terms aforesaid, and was then ready and willing, and then offered fairly and duly to guage, and allow the defendant to guage the said beer and stock in trade, and also to allow as part of the said sum of sixty-one pounds the amount of all rent, rates, taxes, and assessments, and other outgoings then due and owing by the plaintiff, for or in respect of the said premises, including the cost or value of the repair of all damaged external windows, and in every respect to complete and fulfil the said agreement on his the plaintiff's part to be fulfilled; and the plaintiff says, that although the defendant did pay the said deposit of four pounds at the time of signing the said agreement into the hands of the plaintiff; yet the defendant did not nor would on the day and year last aforesaid, or at any other time, pay to the plaintiff the said sum of sixty-one pounds or any part thereof, or fulfil the terms of the said agreement so to do, or pay to the plaintiff the said sum of thirty pounds, or any part thereof, though often requested thereunto; but has hitherto neglected and refused, and still does neglect and refuse so to do, to the plaintiff's damage, &c.

Special demurrer, assigning for causes, that it appears, in and by the declaration, that the plaintiff seeks to recover, in this action, damages for the non-performance, by the

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defendant, of the said agreement in the declaration mentioned; and that it also appears, in and by the said declaration, that it is expressly stipulated, in and by the said agreement, that such damages are payable on demand; whereas it does not appear, in and by the said declaration, that any such demand was made, and which demand, as the defendant contends, was a condition precedent before any action could be brought for the recovery of the said damages.

Byles, Serjt., in support of the demurrer. The declaration is bad for not stating that the sum of 30*l.*, for which the action is brought, has been demanded. It appears, on the face of the declaration, that the defendant has never been let into possession; therefore it is clear that this action cannot be brought to recover the sum of 61*l.*, which was to be paid for the remainder of the term, and for the fixtures and stock on the premises. It must, therefore, be brought to recover this sum of 30*l.*, which the parties have agreed between themselves, shall be the measure of the liquidated damages, in case either party should omit to fulfil his branch of the contract. And that sum, by the contract, is only payable on demand. The case of *Birks v. Trippet* (a), shews that upon a promise to pay a penalty or a collateral sum, there ought to be an actual request before the action brought. The averment of licet sæpius requisitus is not sufficient, where a request is by law necessary, *Wallis v. Scott* (b). In the case of a money bond, if the penalty is to be paid "on demand," a demand must be proved; *Carter v. Ring* (c). So if the defeazance of a warrant of attorney state it to be given to secure the payment of a sum on demand; *Nicholl v. Bromley* (d). So also, where an act of Parliament states that a sum is to be paid upon demand; *Simpson v. Routh* (e). [*Erle*, J.—The breach, as laid in the de-

(a) 1 Wms. Saund. 32.

5 Moore, 307.

(b) 1 Str. 88.

(e) 2 B. & C. 682; See S. C.

(c) 3 Campb. 459.

4 D. & R. 181.

(d) 2 B. & B. 464; See S. C.

claration, is that the defendant did not pay the sum of 61*l.*, or fulfil the contract, or pay the sum of 30*l.* The action may, therefore, be well brought for the non-payment of the 61*l.*, without alleging any demand]. There is no good breach alleged as to the 61*l.* The plaintiff was to allow the defendant certain payments out of the 61*l.*, which could only accrue due on defendant's entry into possession of the house, which was, therefore, a condition precedent. Therefore, the defendant neither shews that the 61*l.* is due, nor any breach of contract followed by a demand from which a right to sue for the 30*l.* accrues.

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Channell, Serjt., *contra*. The plaintiff sets out an agreement by which the defendant was to pay him 61*l.*, out of which the defendant was to be allowed certain deductions and payments, and then charges that he, the plaintiff was always ready and willing to make the allowances and deductions in question, but that defendant would not pay the said sum of 61*l.* It is true that there is a penalty named if either party breaks the agreement, but the plaintiff is not confined to the penalty, in his action, for the breach of contract; *Harrison v. Wright* (a). The allegation as to the non-payment of the 30*l.*, may be regarded either as surplusage, or as negating a part payment.

Byles, Serjt., in reply.

TINDAL, C. J.—If it could be clearly shewn that this action is brought for the non-payment of the penalty of 30*l.*, the case of *Birks v. Trippet* (b), would be in point, and the declaration would be bad for not averring a demand. But here the declaration is for the non-fulfilment of an agreement entered into between the plaintiff and the defendant, and the plaintiff avers for breach that the defendant did not pay the sum of 61*l.*, or any part thereof, or fulfil

(a) 13 East, 343.

(b) 1 Wms. Saund. 32.

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the terms of the said agreement so to do." This is, in itself, a perfectly good breach, and the declaration discloses a good cause of action. It then goes on to say, "that the defendant has not paid the said sum of 30*l.*, or any part thereof," in order to exclude the defendant from saying that he might have paid that. I therefore think that the declaration is good.

MAULE, J., CRESSWELL, J., and ERLE, J., concurred.

Judgment for Plaintiff.

WEST v. COOK.

In an action on a bond, after demand of oyer, and before plea pleaded, the defendant may compel a plaintiff, residing abroad, to give security for costs.

THIS was an action on a bond for the payment of money. The plaintiff resided at Dublin. The defendant, after the delivery of the declaration, had demanded oyer of the bond; but before plea pleaded, he obtained a rule nisi for the plaintiff to give security for costs.

Talfourd, Serjt., shewed cause. The application has been made too late. By the demand of oyer, the defendant has taken a step in the cause. In *Montellano v. Garcias* (a), and *Muller v. Gernon* (b), it was held, that after a defendant has undertaken to accept short notice of trial, he cannot require security for costs from the plaintiff, a foreigner residing abroad. By not applying promptly, the defendant has caused greater costs to be incurred than would otherwise have been the case.

Channell, Serjt., in support of the rule. There is a wide distinction between an application of this kind, when made before issue joined, and when made after issue joined. In

(a) 1 Bing. 67; See S. C. 7 Moore, 361.

(b) 3 Taunt. 272.

the cases cited, issue had been joined before the rules were moved.

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TINDAL, C. J.—That appears to be the proper distinction.

Rule absolute.

JOSEPH v. BUXTON.

IN the original action in this case, the plaintiff sued upon a bill of exchange for 15*l.*, and obtained judgment thereon. His costs were taxed at 9*l.*, and the present action was brought upon the judgment of 24*l.*, the amount of the debt and costs. The defendant pleaded nul tiel record, but the plaintiff obtained judgment.

The Court will not interfere under the 7 & 8 Vict. c. 96, s. 57, to stay the proceedings in an action upon a judgment for debt and costs in a former action; although it appears that the sum recovered in the original action did not exceed 20*l.*

Dowling, Serjt., now moved for a rule to shew cause why all further proceedings should not be stayed. He referred to the statute of 7 & 8 Vict. c. 96, s. 57, which enacts that no person shall be taken in execution upon any judgment, "in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment," and submitted that the object of the statute would be entirely defeated if parties were allowed to take defendants in execution upon judgments obtained like that in the present case. He admitted that the case of *Hopkins v. Freeman* (a), was against the defendant; and, therefore, the only question was, whether the Court felt bound by the authority of that decision.

PER CURIAM.

Rule refused.

(a) *Ants.* p. 447.

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BONZI and Another v. STEWART (a).

To trover for certain goods, the defendant pleaded that D., A., & Co. were the factors and agents of the plaintiffs, and as such factors and agents had a lien on the goods; that the plaintiffs consigned them to D., A., & Co. as such factors and agents; that they were intrusted as such factors and agents, with the dock warrants for the delivery of the goods; that being so intrusted with the dock warrants, they pledged the goods to the defendant; and that being so intrusted with the dock warrants, they delivered them to the defendant upon such pledge; and that the defendant had not notice at the time of the pledge, that the said D., A., & Co. were not the bona fide proprietors of the goods.

The plaintiffs replied that D., A., & Co. were not intrusted with the warrants *modo et formà*: Held, on demurrer to the replication, that the plea did not sufficiently show a pledge by delivery of the goods; but only a symbolical pledge by delivery of the warrants: and, therefore, contained no sufficient answer to the declaration.

TROVER for certain bales of silk.

Sixth plea, as to four bales, &c., parcel, &c., that at the several times hereinafter mentioned, certain persons using the firm, style, and description of Douglas, Anderson & Co., were the factors and agents of the plaintiffs in the city of London; and the plaintiffs, before and at the time of the pledge hereinafter mentioned, were indebted to the said D., A., & Co., as such factors and agents as aforesaid, in a large sum of money, to wit, the sum of 8,000*l.*, and which said sum of money still remains unpaid; that, at the time of the pledge hereinafter mentioned, the said D., A., & Co., as such factors and agents as aforesaid, had a lien upon the said four bales of silk, parcel, &c., and a right to detain the same for the said sum of money so due to them as aforesaid, and a right to enforce such lien against the plaintiffs; that the plaintiffs being possessed of the said four bales of silk, parcel, &c., did, before the committing the said supposed grievances, consign the said four bales of silk, parcel, &c., to the said D., A., & Co. as such factors and agents as aforesaid; that the said D., A., & Co. were, before and at the time of the pledge hereinafter next mentioned, as such factors and agents as aforesaid, intrusted by the plaintiff with, and were in possession of divers, to wit, four dock warrants, for delivery of the said last mentioned four bales of silk, parcel, &c., and in which said last mentioned dock warrants, the said last mentioned four bales of silk were described and mentioned; that the said D., A., & Co., being so intrusted with and in possession of the said dock warrants,

(a) See this case reported on another point, *ante*, p. 258.

to wit, on the 7th day of October in the year aforesaid, under a certain agreement then made between the said D., A., & Co. and the defendant, did pledge the said last mentioned four bales of silk, parcel, &c., to the defendant as a security for the repayment of a large sum of money, to wit, the sum of 2,567*l.*, then due from the said D., A., & Co., to the defendant, and which said sum of money last mentioned was, at the time of the said last mentioned pledge, a debt for money advanced by the defendant to the said D., A., & Co, and a large part thereof, to wit, the sum of 2,000*l.*, still remained unpaid; and that the said D., A., & Co., being so intrusted with and in possession of the said dock warrants, upon such pledge last mentioned, to wit, on the day and year last aforesaid, did deliver to the defendant the said last mentioned dock warrants; that the defendant had not notice before or at the time of the said last mentioned pledge by the said last mentioned dock warrants, or either of them, or otherwise, that the said D., A., & Co, were not the actual bonâ fide owners and proprietors of the said last mentioned four bales of silk, parcel, &c., so pledged as last aforesaid. And that the defendant, at the said time when, &c., detained, and still detains the said last mentioned four bales of silk, under and by virtue of the said last mentioned pledge as aforesaid, on account of the said sum of money, due from the said D., A., & Co. to the defendant, to the extent of the right of lien which the said D., A., & Co, had a right to enforce in respect of the said four bales of silk, parcel, &c., as aforesaid; which is the conversion thereof in the said declaration mentioned. Verification.

Replication. That the said D., A., & Co., were not so intrusted with the dock warrants in that plea mentioned, or any or either of them, modo et formâ. Conclusion to the country.

Special demurrer, assigning for causes (amongst others); that, admitting the replication to be true, the plea nevertheless, without the allegation traversed by the replication thereto, disclosed a sufficient answer to the declaration; that

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the traverse was too narrow ; that the plea, on the face of it, disclosed two good answers to the declaration, one only of which was answered by the replication; and that the traverse was an immaterial one.

Joinder in demurrer.

Shee, Serjt., in support of the demurrer. It is submitted that the replication is bad, and that the traverse taken by it is immaterial. The defence disclosed by the plea is founded not only on the 6 Geo. 4, c. 94, but also on the 4 Geo. 4, c. 83, s. 2. [*Cresswell*, J.—The latter statute only gives power to a consignee to pledge. *Tindal*, C. J.—What is there to shew on the face of the plea that D., A., & Co., were possessed of the goods?] There is an allegation that they had a lien on them, and a right to detain them, so that they must have been possessed of them. Whether, therefore, they were intrusted with the dock warrants or not, is a fact totally immaterial. The plea then goes on to state that they “did, pledge the said last mentioned four bales of silk, parcel, &c. to the defendant.” [*Tindal*, C. J.—But you preface that by saying that they being in possession of the dock warrants did so, evidently relying on a symbolical pledge of the goods. *Cresswell*, J.—Look at the course of events set forth in the plea. It states that the plaintiffs were indebted to D., A., & Co. as factors and agents, and that as such factors and agents, D., A., & Co. had a lien on the goods; that the plaintiffs consigned them to D., A., & Co., as such factors and agents; that they were intrusted, as such factors and agents, with the dock warrants for the delivery of the goods; that being so intrusted with the dock warrants, they pledged the goods to the defendant; and that being so intrusted with the dock warrants, upon such pledge, they delivered them to the defendant. It does not state that the goods ever arrived, or that they were ever delivered, but simply that the dock warrants were delivered]. It is submitted that there is a sufficient statement that D., A., & Co., were consignees of the goods, and, if so, they were entitled to make this pledge

under the 4 Geo. 4, c. 83, s. 2, and the plea sufficiently discloses the fact of such pledge having been made. [*Cresswell*, J.—The allegation is, that the plaintiffs consigned the goods to D., A., & Co., “as such factors and agents as aforesaid.” *Erle*, J.—The plea does not allege that the defendant received the goods from the consignees]. If the statute 6 Geo. 4, c. 94, had never been passed, this plea, it is submitted, would still have been good after verdict. [*Cresswell*, J.—You are asking us to reject the plain and obvious meaning of the plea, and to adopt a sense which would make your plea bad for duplicity. *Tindal*, C. J.—All that, in fact, is asserted by this plea is that D., A., & Co. were intrusted with the dock warrants, and so pledged the goods. If that were not so, why was any mention made at all about the dock warrants?]

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The learned Serjeant then prayed leave to amend.

PER CURIAM.

Leave to amend.

JACKSON and Another v. GALLOWAY.

ASSUMPSIT on a charter-party.

The declaration (a) contained several counts; the first of which was a special count for a refusal to pay freight and primage according to the terms of the charter-party,

(a) The pleadings are set out at full in the report of this case (in error) 3 M. & G. 960.

In an action upon a charter-party, the declaration contained a special and an indebitatus count, to both of which the evidence at the trial applied. After verdict

for the plaintiffs, the Judge who tried the cause directed that the verdict should be entered for the plaintiffs upon the special, and for the defendant upon the indebitatus count. On error brought by the defendant, the judgment entered up for the plaintiff on the special count was reversed by the Court of Exchequer Chamber on the 15th of February, 1842. In November, 1844, the plaintiffs applied to amend the *postea* by entering up judgment for them on the indebitatus instead of on the special count: *Held*, that assuming the Court to have jurisdiction, the application was too late.

Semble, that the Court out of which a record issues has no power to amend the record after the judgment of a Court of error.

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or the sum due for demurrage; the third was an indebtedness count for the use and hire of ships retained and kept on demurrage. At the trial, before *Tindal*, C. J., which took place at the Sittings after Trinity Term, 1838, the question raised for the determination of the jury related to an alteration in the terms of the charter-party, and it was not attempted to establish a distinct subject-matter of complaint in respect of the first and third counts; though it appeared, upon the affidavits used on the present application, that the evidence would have supported a verdict on either count. The jury found a verdict for the plaintiffs. Considerable difficulty took place in settling the *postea*, the defendant contending that the verdict ought to be entered for him upon the first count, and for the plaintiffs upon the third count; but the plaintiffs insisted that the verdict upon the first count ought to be entered for them, consenting that the verdict should be entered upon the third count for the defendant. The Lord Chief Justice, before whom the parties attended, decided in favour of the latter mode of entering the verdict, and the *postea* was so finally settled in April, 1840. The defendant afterwards brought a writ of error, which was argued in the Exchequer Chamber in June, 1841, and on the 15th of February, 1842, the Court of Exchequer Chamber gave judgment for the plaintiffs in error, upon the ground that the first count of the declaration was bad, for not showing, by distinct averment or necessary implication, that the plaintiffs below were the owners for whom the charter-party was made.

In Michaelmas Term last, Sir T. *Wilde*, Serjt., obtained a rule, calling upon the defendant to shew cause why the *postea* should not be amended by entering a verdict for the plaintiffs on the third count of the declaration, and by entering a verdict for the defendant on the issues joined on the first count; and why the judgment roll should not be amended by making the same conformable thereto; and why there should not be a new taxation of costs with reference to such amendments.

Talfourd and *Byles*, Serjts., now shewed cause, referring to *Mellish v. Richardson* (a); *Harrison v. King* (b); *Salter v. Slade* (c); and *Cheese v. Scales* (d).

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Sir T. *Wilde*, Serjt. (with whom was *Greenwood*), in support of the rule, cited *The King v. Carlile* (e); *Henley v. The Mayor, &c. of Lyme Regis* (f); *Doe v. Perkins* (g), and *Petrie v. Hannay* (h).

TINDAL, C. J.—It appears to me that this amendment ought not to be allowed. In the first place, I doubt, upon principle, whether we have authority to make the amendment, and no case has been referred to at the Bar which goes the length of deciding that, after judgment delivered in a Court of error, the Court out of which the record comes can, without the consent of the Court of error, make an amendment in the record. In *Petrie v. Hannay*, the amendment was made before argument in the Court of error; and in *Mellish v. Richardson*, the postea was amended before the judgment of the Court of error had been delivered. Here, however, after time taken by the Court of Exchequer Chamber to consider their judgment, and after an interval of nearly three years since that judgment was pronounced, the plaintiffs come and ask us to allow this amendment to be made. In the absence of any authority in support of such an application, it seems to me that this Court has no jurisdiction to permit the amendment; but, supposing that we have jurisdiction, I think we ought, in the exercise of our discretion, to abstain from making the amendment prayed for. The plaintiffs ask us to allow a

(a) 7 B. & C. 819; See S. C. error, *ante*, vol. 1, p. 657; 12 M. 9 Bing. 125; 2 M. & Scott, 191. & W. 685.

(b) 1 B. & A. 161. (e) 2 B. & Ad. 971.

(c) 1 A. & E. 608; See S. C. (f) 6 Bing. 100; See S. C. 3 N. & M. 717. 3 M. & P. 278.

(d) 10 M. & W. 488; See S. C. (g) 3 T. R. 749.
2 Dowl. 438, N. S.; S. C. in (h) *Ibid.* 659.

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verdict to be entered for them on the third count, and for the defendant on the issues joined on the first count. Now this is not a mere technical amendment. If the application to enter the verdict on the third count for the plaintiffs had been made at the trial, the defendant, might, perhaps, have raised an objection which it is now too late to bring forward; he might have contended that *indebitatus assumpsit* could not be maintained under the circumstances. Of course I do not mean to say what would have been the effect of such an objection; but if the decision of the Judge who tried the cause had been against the defendant, he might have tendered a bill of exceptions. I think, also, that the lapse of time is a strong circumstance in the case. The plaintiffs might have applied to us to make the amendment while the Court of Exchequer Chamber had their judgment under consideration; but instead of doing so, they lay by, and waited to take the chance of that judgment being in their favour. It has been said at the Bar, that, at one time, the defendant was anxious to have the verdict entered as the plaintiffs now desire it should be entered; but it must not be forgotten that the plaintiffs were then equally anxious that it should not be entered in that way. Although I cannot but feel sorry, after the plaintiffs have recovered a verdict, that the verdict should be set aside on a mere technical point; yet this case must be decided upon principle, and I, therefore, think that this application must be refused.

MAULE, J.—I am of the same opinion. What we are asked to allow, amounts to something more than a technical amendment; it is an alteration of the record, after the judgment of the Court of error upon that record has been delivered. I do not think that this Court has such a power, but it is not necessary to decide that point. The question is, in what way the verdict ought to be entered. That is a matter for the determination of the learned Judge who

tried the cause, and he has decided it by directing that the verdict should be entered for the plaintiffs on the first count, and for the defendant on the third. We have no jurisdiction to reverse the judgment of the Lord Chief Justice on such a point. My Lord, indeed, may request our assistance as assessors in reviewing the propriety of that decision; but I think we ought not to advise him to alter the record after such a lapse of time.

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CRESSWELL, J.—I concur in the doubt which has been expressed as to our having authority to make this amendment. No case has been cited in which an amendment in a record has been made by the Court out of which the record issued, after the judgment of a Court of error had been delivered, except *The King v. Carlile* (a); and there Court of error gave permission for the alteration to be made, and the *Attorney General*, on the part of the Crown, also consented. That case, therefore, is no authority for the present application. Supposing us, however, to have the power of making the amendment, it seems to me that in doing so, we should exercise, not a discretion, but a mischievous authority. After the long time which has elapsed since this question first arose, I think that there is no ground for our interference.

ERLE, J., concurred.

Rule discharged, with costs.

(a) 2 B. & Ad. 971.

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HEMSWORTH v. BRIAN.

Upon reference of a cause and all other matters in difference, it was ordered that the costs of the cause, and of the reference and award, should abide the result of the award.

The arbitrator found that the plaintiff had no cause of action in respect of the first count of the declaration; but that, in respect of the other counts, the defendant was indebted to the plaintiff in the sum of 68*l.* 9*s.* 7*d.*, and that on the taking of all the accounts, including that sum, the plaintiff was indebted to the defendant in 17*l.* 7*s.* 5*d.*, which sum he ordered the plaintiff to pay, but said nothing about the costs. Before the

IN this case the cause and all other matters in difference, were referred to an arbitrator, by a Judge's order, which directed that the costs of the cause, and of the reference and award, should abide the result of the award.

The action was brought upon three bills of exchange, and upon an account stated. The defendant pleaded to the first count, payment; to the second count, so far as related to the sum of 108*l.*, parcel, &c., payment, and as to the residue, a set-off; to the third count, that no notice of dishonour had been given; and to the last count, non-assumpsit. Issues were joined on all these pleas. On the 23rd of March, 1843, the arbitrator made his award, by which he found that the plaintiff had no cause of action on the first count; and that as to the second, third and fourth counts, the defendant was indebted to the plaintiff in 68*l.* 9*s.* 7*d.* He found, also, that on an account being taken of all the matters referred, including that sum, the plaintiff was indebted to the defendant in 17*l.* 7*s.* 5*d.*, and this he directed the plaintiff to pay the defendant. The award also directed that certain wine and brandy warrants, among which was one for a hogshead of wine, numbered 2,260, and, likewise, some wine bottles and other articles, should be delivered to the defendant. Nothing was said in the award about the defendant's costs. A rule nisi was afterwards obtained by the defendant for an attachment for non-performance of the award, upon an affidavit stating,

award was made, a fiat in bankruptcy issued against the plaintiff: *Held*,

First, that the finding of the arbitrator was sufficiently certain, the matter really referred being the state of the accounts between the parties, which was the result to be ascertained; and, consequently, that the defendant was entitled to his costs.

Secondly, that the bankruptcy did not operate as a revocation of the submission.

The award directed, *inter alia*, that the plaintiff should deliver to the defendant a warrant for a hogshead of wine, marked 2,260. The defendant having demanded the delivery of the wine: *Held*, that the demand ought to have been made of the warrant; but that an attachment might issue for the non-performance of the other parts of the award.

The jurat of an affidavit, which stated the affidavit to have been sworn at the Judges' Chambers in the county of Middlesex, was held sufficient by the Court.

that, on the 8th of November, he made a demand of the sum awarded and of the costs, and also that he demanded, at the same time, the hogshead of wine, numbered 2,260, and the various warrants, &c. mentioned in the award. The jurat of the affidavit described the party as having been sworn at the Judges' Chambers, Serjeants' Inn, Chancery Lane, in the county of Middlesex. The plaintiff made an affidavit in answer, which stated that he became bankrupt on the 16th of March, 1844, and that after the making of the award, the defendant attempted to prove his debts under the fiat; that the merits of the award were, by consent, gone into; and that the commissioner finally refused to allow the defendant to prove for any sum whatever.

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Channell, Serjt., now shewed cause against the rule. In the first place, there is an objection to the defendant's affidavit. The jurat states that the Judges' Chambers are in the county of Middlesex, whereas they are in the city of London. Perjury, therefore, could not be assigned upon such an affidavit. [*Talfourd*, Serjt., *contra*, referred to a case in which Lord Denman, C. J., had overruled an objection like the present upon an indictment for perjury. *Maule*, J.—The plaintiff ought to have an affidavit that there is no such place in Middlesex as the Judges' Chambers, Chancery Lane]. Then, secondly, the award itself is bad, because the finding of the arbitrator is not sufficiently definite and precise. The plaintiff was, at least, entitled to the costs of the cause, because the arbitrator found that upon the last three counts, the defendant was indebted to the plaintiff in the sum of 68*l.* 9*s.* 7*d.* [*Maule*, J.—According to the terms of the order of reference, the costs of the cause are not to abide the event of the cause, but the result of the award.] That must mean the result of the award upon the different matters respectively. [*Maule*, J.—No; the costs are to follow the decision upon the balance of accounts between the parties, which really

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seems to be the thing referred. It is clear that the term "result" being used in the singular number, speaks of the dispute between the parties, which is to have the result.] The next objection is, that the award was made after a fiat in bankruptcy had issued against the plaintiff, and, it is submitted, that the attachment ought not to go, upon the ground that the bankruptcy operated as a revocation of the submission to the order of reference; *Marsh v. Wood* (a); *Taylor v. Shuttleworth* (b). [*Talfourd*, Serjt., referred to *Andrews v. Palmer* (c), as being expressly in point to shew that bankruptcy does not operate as a revocation of the submission. *Maule, J.*—In *Marsh v. Wood*, the defendants revoked their submission before the award was made, which, as the law formerly stood, they might do. But there is no reason why bankruptcy should now operate as a revocation, particularly when neither the assignees, nor the bankrupt, nor the defendant wish that it should so operate.] The last objection which is intended to be raised, goes to part only of the rule. No proper demand has been made of the warrant for the hogshead of wine, marked 2,260. It was the wine only which was demanded.

MAULE, J.—At all events the attachment will go for the non-performance of all the other matters directed to be done by the award, and the defendant must make another demand for the wine warrant belonging to hogshead 2,260.

Rule absolute, accordingly.

- (a) 9 B. & C. 659; See S. C. S. C. 8 Scott, 565; 8 Dowl. 281.
 4 M. & R. 504. (c) 4 B. & A. 250.
 (b) 6 Bing. N. C. 277; See



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BOYD and Another v. LETT.

ASSUMPSIT. That heretofore, to wit, on, &c., the defendant agreed to buy of the plaintiffs, and the plaintiffs, at the request of the defendant, then agreed to sell to the defendant a large quantity of goods, to wit, all the then remaining parcel of guano, then being about forty-three tons, brought by the Magnet from Ichaboe, and then landed at Fenning's Wharf, upon the following terms, that is to say, the price to be 8*l*. per ton, at wharf delivery weights, the defendant to be allowed the same tare and draught as are allowed in the department of her Majesty's customs, the said goods to be accepted by the defendant, and the said price to be paid by the defendant to the plaintiffs at the expiration of fourteen days from the time of the making of the said contract, the brokerage to be one per cent., the delivery charges to be paid by the defendant, and the said goods to be delivered by the plaintiffs to the defendant, on the defendant paying the said price, at or before the expiration of the said fourteen days, at the option of the defendant, and no discount to be allowed on such payment; and in consideration thereof, and that the plaintiffs, at the request of the defendant, had then promised the defendant to deliver the said goods to the defendant, according to the aforesaid terms, and in all respects to perform and fulfil the said terms on the part of the plaintiffs to be performed and fulfilled; the defendant then promised the plaintiffs to accept the said goods of and from the plaintiffs, and to pay them for the same according to the aforesaid terms; and although the plaintiffs, from the time of the making of the said promise, for and during, and until and at the expiration of fourteen days from the time of the making of the said contract, were ready and willing to deliver the said goods to the defendant according to the said terms, and to perform and fulfil the said terms in all things on the part of the plaintiffs to be performed and fulfilled, whereof the defendant, during all that time, had notice; and although

Assumpsit for not accepting and paying for goods according to contract, with an averment of the plaintiffs' readiness and willingness to deliver the goods, of which the defendant had notice : *Held*, on special demurrer, that the declaration was sufficient, and that it was not necessary that it should allege a tender, or offer to deliver.

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the said period of fourteen days had elapsed before the commencement of this suit, yet the defendant did not, nor would accept the said goods, or any part thereof, of or from the plaintiffs, or pay them for the same, according to the aforesaid terms; but wholly neglected and refused so to do. Averment of special damage.

Special demurrer, assigning for causes that there was no averment that the plaintiffs had at any time tendered or offered to deliver the goods to the defendant, or that the defendant had dispensed with the tender or offer; and that the mere averment that the plaintiffs were ready and willing to deliver the goods to the defendant, was not sufficient.

Joinder in demurrer.

Channell, Serjt. The plaintiffs should have averred a tender. Suppose that the plaintiffs' case is rested upon a tender and refusal; and the defence to be, that the tender was insufficient; the defendant should be enabled, as in *Isherwood v. Whitmore* (a), to raise the question by traversing the tender. [*Cresswell*, J.—Would not the same effect be obtained by a traverse of the plaintiff's readiness and willingness?] It was in consequence of a doubt upon that point that this demurrer was framed.

Byles, Serjt., in support. It is submitted that the declaration is perfectly good. In *Rawson v. Johnson* (b), which was an action for not delivering goods, it was held that it was sufficient to aver a readiness and willingness to receive the goods and pay the price, without alleging an actual tender of the price. The recent case of *Jackson v. Allaway and Another* (c), in this Court, is however precisely in point. There the declaration contained both averments, and the traverse of the tender was held to be immaterial. The

(a) 10 M. & W. 757; See S. C.
 2 Dowl. 548, N. S.

(b) 1 East, 203.

(c) 7 Scott, N. R. 875; ante,
 vol. 1, p. 919.

case of *Pickford v. The Grand Junction Railway Company* (a), is also an authority in favour of the plaintiff. [*Erle, J.*— Suppose the plaintiff had brought the commodity, and said we are ready and willing to deliver; and the defendant had asked to inspect it, which the plaintiffs had refused; would that state of facts have supported an allegation of readiness and willingness to deliver?] The case of *Isherwood v. Whitmore* (b) shews that it would not.

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Channell, Serjt., then prayed leave to amend.

PER CURIAM.

Leave to amend.

(a) 8 M. & W. 372; See S. C. 9 Dowl. 766.

(b) 10 M. & W. 757.

COURT OF EXCHEQUER.

Easter Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA

1845.

Where a declaration contains several counts, and before plea pleaded, the cause is referred to arbitration; the arbitrator is not bound to find specifically upon each count.

BEARUP and Another v. PEACOCK.

A RULE had been obtained, calling on the defendant shew cause why an attachment should not issue against him for the non-performance of an award. Before plea, the action was referred to arbitration, by order of a Judge. The award, after reciting that the action was brought to recover 381*l.* 9*s.* 11*d.*, due on bills of exchange and for wages and labour, goods sold, money paid, &c., was as follows:—I do award that the said W. Bearup and M. Shevill be in good cause of action against the said Thomas Peacock, and I do assess and award the damages to be paid by the said T. Peacock to the said W. Bearup and M. Shevill, at the sum of 86*l.* 14*s.* 5*d.*

Knowles shewed cause, and contended that the award was bad, inasmuch as the arbitrator had not distinctly found upon each issue. He admitted, that as the declaration had not been brought before the Court by affidavit, he was not at liberty to refer to it, *Rowe v. Sawyer* (a); but submitted that the Court could see on the face of it

(a) 7 Dowl. 691.

award that the arbitrator had not awarded on all the issues.

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PER CURIAM.—It does not appear by the award that a distinct issue was raised upon each count of the declaration. For aught that appears, the claim may have been limited to one count only.

Rule absolute.

Knowles, on the following day, moved for a rule nisi to set aside the award, on the ground that the arbitrator had not disposed of all the issues, and also for misconduct on the part of the arbitrator.

PER CURIAM.—The defendant may take a rule on the last ground; but as to the first, there is no foundation for a rule. The parties have referred the matters in difference in the cause; but, until plea pleaded, we cannot tell what the issues are. The defendant may not have disputed more than one portion of the plaintiffs' claim, and may have let judgment go by default as to the rest. Is there any authority that an arbitrator must decide upon each count where there is no plea?

Knowles was not aware of any such authority; whereupon

The Court refused the rule.

Rule refused.



1845.

Earl of STAMFORD v. DUNBAR.

On a feigned issue under the Tithe Commutation Act, the successful party is to be allowed costs, unless he has disentitled himself by misconduct or otherwise.

THIS was a feigned issue under the 46th section of the Tithe Commutation Act (6 & 7 Wm. 4, c. 71). The question was as to the existence of a certain modus in the parish of Marshfield, in the county of Leicester. A verdict was found for the plaintiff, liberty being reserved for the defendant to move to enter a nonsuit. A rule nisi was granted, but, after argument, discharged, the Court being of opinion that the assistant tithe commissioner was wrong, in point of law, in his decision in granting the issue.

Cowling had obtained a rule nisi to allow the plaintiff his costs, under the 46th section of the 6 & 7 Wm. 4, c. 71, which (after enabling any person who shall be dissatisfied with the decision of the commissioners, or assistant commissioner to try an issue at law, or take the opinion of a Court of law on a case to be stated), provides "that the costs of every such action, or of stating such case, and obtaining a decision thereon, shall be in the discretion of the Court in or by which the same shall be decided."

Whitehurst shewed cause. This is not a case in which the Court will exercise the discretion vested in them by the statute. The trial was caused by the erroneous judgment of the assistant commissioner on a point of law, and the Court will, therefore, be governed by the law in analogous instances. The 8 & 9 Wm. 3, c. 11, s. 2, gives costs on a writ of error when the judgment is affirmed, or the writ of error discontinued, or the plaintiff nonsuited; but none are allowed when the judgment is reversed, because, in such a case, it is the Court which has committed an error. So here the assistant commissioner must be considered in the light of a Judge, and as the proceedings have been occasioned by his mistake, the plaintiff can have no redress.

Cowling, in support of the rule, mentioned a case of *Mackintosh v. Hamilton* (a), and also another case in the Court of Queen's Bench, in which the successful party had been awarded his costs, although the action was, in part, occasioned by a mistake of the commissioner.

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POLLOCK, C. B.—Neither of those cases determine the question as to allowing costs where the issue has arisen from the erroneous judgment of the commissioner on a point of law. But the rule which we are disposed to lay down is this, that the successful party shall have his costs, unless he has disintitiled himself to them by misconduct or otherwise.

PARKE, B.—The right to costs depends upon the practice of the Courts, which is by no means uniform. Some tribunals afford the party an indemnity for the costs incurred in each Court. That is so in appeals from the East Indies, and it seems to proceed on the principle that a man ought to be indemnified for all the cost which he may have been put to in establishing his right, or resisting a wrongful claim.

Rule absolute.

(a) Easter Term, not yet reported.

VIZETELLY v. WICKOFF.

THE defendant, in this case, was arrested by virtue of a Judge's order, made under the 1 & 2 Vict. c. 110. He afterwards paid a sum of money into Court in lieu of special bail. The writ of summons, which had been sued out on the 26th of August, had expired, never having been served on the defendant. A rule nisi having been obtained to enter an appearance for the defendant;

Where a defendant on his arrest under a Judge's order, deposited a sum of money in lieu of bail under the 7 & 8 Geo. 4, c. 71, and the writ of summons had expired

without service on the defendant, the Court refused to allow the plaintiff to enter an appearance for the defendant.

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Corrie shewed cause. The writ of summons is of no avail ; it not having been served within four months from the date thereof, as required by the 2 Wm. 4, c. 39, so that there is no process to warrant the appearance. The defect is not mended by the *capias*, or the proceedings under it, as they are altogether collateral to the suit. That is evident from the fifth section of the 1 & 2 Vict. c. 110, which enacts, "that any such special order may be made, and the defendant arrested in pursuance thereof, at any time after the commencement of such action, and before final judgment shall have been obtained therein ; and that a defendant in custody upon any such arrest, and not previously served with a copy of the writ of summons, may be lawfully served therewith." If the arrest was equivalent to service of the writ of summons, the latter part of the section would be unnecessary.

The Court called on

Petersdorff to support the rule. Assuming that an arrest, under the 1 & 2 Vict. c. 110, is a proceeding collateral to the action, still the payment of money into Court in lieu of bail, gives the Court full power to grant this application. The 43 Geo. 3, c. 46, s. 2, enables persons arrested on mesne process, in lieu of bail to the sheriff, to deposit with the sheriff the sum indorsed on the writ, together with ten pounds for costs. And the 7 & 8 Geo. 4, c. 71, enacts, "that in all cases in which any defendant shall have been discharged from arrest upon making such deposit," &c., "and the sum so deposited shall have been paid into Court, it shall be lawful for such defendant, instead of putting in and perfecting special bail in the action, according to the course and practice of the Court, to allow the sum so deposited with the sheriff, and by him paid into Court as aforesaid, together with the additional sum of 10*l.* to be paid into Court by such defendant as a further security for the costs of the action, to remain in the Court to abide the event of the suit ; and in all cases where any defendant shall have been arrested

and shall have given bail to the sheriff, or shall have been arrested and remain in custody, it shall be lawful for such last mentioned defendant, instead of putting in and perfecting special bail, to deposit and pay into the said Court, the sum indorsed upon the writ," &c., "and the further sum of 20*l.* as a security for the costs of the action, there to remain to abide the event of the suit; and, thereupon, the said defendant may, and he is hereby required to enter a common appearance, or file common bail in the action, within such time as he would have been required to have put in and perfected special bail in the action, according to the course of the said Court, or in default thereof, the plaintiff in the action is hereby empowered to enter such common appearance, or file common bail for the said defendant, and the cause may proceed as if the defendant had put in and perfected special bail." The payment of money into Court being equivalent to putting in and perfecting special bail, the Court has full power over the cause, notwithstanding the writ of summons has not been served.

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PARKE, B.—The *capias* under the 1 & 2 Vict. c. 110, and subsequent proceedings thereon, are only collateral to, and independent of, the process in the cause; therefore the payment of money into Court in lieu of bail, is no waiver of the want of service of the writ. The rule must be discharged.

POLLOCK, C. B., and ROLFE, B., concurred.

Rule discharged.



1845.

HAGGER v. BAKER.

On an arbitration, the plaintiff tendered in evidence certain books containing entries made by himself, which being objected to as inadmissible, the arbitrator stated that the same strictness was not required as on a trial at nisi prius, and received the books in evidence:
Held, no ground for setting aside the award for misconduct on the part of the arbitrator.

A RULE had been obtained, calling on the plaintiff to shew cause why the award made in this cause, should not be set aside on the ground of misconduct in the arbitrator, in knowingly receiving evidence on behalf of the plaintiff, which was inadmissible. It appeared, from the affidavits, that the plaintiff, in support of his case, produced, in evidence before the arbitrator, certain books, which contained entries made by the plaintiff himself, and, also, by one Carrington, from his dictation and from that of his servants; and that Carrington, of his own knowledge, knew nothing of the transactions so entered. It was objected, on the part of the defendant, that these books were not evidence for the plaintiff; but the arbitrator stated that the same strictness as to evidence was not required on an arbitration, as at a trial at Nisi Prius; and that though the books were not admissible in evidence, yet he had authority to receive them, and should do so. The books were accordingly put in.

Byles, Serjt. (*Birch* with him), shewed cause. There is no ground for setting aside the award. The arbitrator may have entertained a mistaken view of his authority; but it is not suggested that he acted corruptly, and with the intention of favouring the plaintiffs. Besides, the affidavits only state that the arbitrator received the books, and it does not appear that he attached any weight to the evidence, or came to a conclusion in consequence of it. (He was then stopped by the Court).

Butt and *Hawkins*, in support of the rule. This is not a mere error in judgment, which, it is admitted, would be no ground for setting aside the award; but it is wilful misconduct in the arbitrator, who persisted in receiving inadmissible evidence after it was objected to. *In re Hall* and

Hinds (a) is an authority to shew that under such circumstances, the Court have power to interfere.

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POLLOCK, C. B.—The rule must be discharged. *In re Hall and Hinds*, is certainly not reconcileable with previous decisions, and it seems to me that it can only be supported on the ground that the arbitrators had not done what they intended to do. The general rule is, that if an arbitrator makes a mistake in law, which is not apparent on the face of the award, the party injured has no redress. The same rule applies to a mistake in fact, and if the award is good upon the face of it, the Court will not inquire into the merits. In this case, it does not appear that the arbitrator founded his judgment upon the entries in these books, and he may have examined them merely for the purpose of informing his conscience without any intention of acting upon them.

PARKE, B.—I am of the same opinion. The case of *In re Hall and Hinds* has gone quite far enough. That case was considered by this Court in *Phillips v. Evans* (b), and we refused to carry it further. Besides, there is nothing to shew that the arbitrator acted upon the entries in question.

ALDERSON, B., and ROLFE, B., concurred.

Rule discharged.

(a) 2 M. & G. 847; S. C. 3 Scott, N. R. 250.

(b) 12 M. & W. 309; S. C. *ante*, vol. 1, p. 463.



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LANGSTON v. WETHERALL.

(Coram Alderson, B.)

On an application to hold a defendant to bail, the plaintiff may use affidavits made in another Court in an action against the same defendant at the suit of a different plaintiff.

IN this case an application had been made to *Rolfe*, B., to hold the defendant to bail under the 1 & 2 Vict. c. 110. The learned Judge thought the affidavit in support of the application insufficient, and adjourned the summons, in order that the plaintiff might produce a further affidavit. On the hearing of the summons on a subsequent day, the plaintiff produced an affidavit which had shortly before been made use of by a different plaintiff on a similar application against the same defendant, in the Court of Common Pleas. This latter affidavit was entitled "*In the Common Pleas—Revell v. Wetherall.*" The learned Judge having made the order thereon, a summons was taken out before him to rescind that order, on the ground that the affidavit made in the Common Pleas was improperly received. The summons having been dismissed,

Udall obtained a rule nisi to rescind the order of *Rolfe*, B., by reason of the above objection.

Horn appeared to shew cause, but the Court called on

Udall to support the rule. The affidavit being entitled in another Court, and made in a cause at the suit of a different plaintiff, was inadmissible, and ought not to have been received by the learned Judge. The rule of Hilary Term, 2 Wm. 4, r. 4, declares, "that an affidavit sworn before a Judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the Court to which such Judge belongs, though not entitled of that Court, but not in any other Court, unless entitled of the Court in which it is to be used." Here the affidavit is

sworn before a Judge of the Court of Common Pleas, and is entitled in that Court. Besides the facts contained in the affidavit, might be perfectly true at the time it was sworn, though not so at the time the affidavit was used in this Court.

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ALDERSON, B.—The true test as to the admissibility of this affidavit, is to see whether perjury could be assigned upon it. Assuming the allegations to have been false at the time the affidavit was made, there is no doubt perjury could be assigned upon it; and for that purpose it would only be necessary to state that the perjury was committed in the cause in the Common Pleas, instead of in the cause in this Court. As to the objection that the facts stated in the affidavit might not be true at the time it was used in this Court, the same objection might be raised against any affidavit which is used a month after it was sworn. I entertain no doubt that the affidavit was properly received, but I will consult the other Judges.

Cur. adv. vult.

On a subsequent day,

ALDERSON, B., said, I have consulted the other Judges of this Court, and they are unanimously of opinion that the affidavit was properly received. The rule will, therefore, be discharged, with costs.

Rule discharged, with costs.

ROBSON v. LUSCOMBE.

ASSUMPSIT by payee against maker of a promissory note.

Plea, that the plaintiff caused, and procured and induced the defendant to make, and the defendant did make

To an action on a promissory note, the defendant pleaded that he made the note through, and by means

of the fraud, covin, and misrepresentation of the plaintiff. Replication, that defendant did not make the note through the fraud, covin, and misrepresentation of the plaintiff: *Held* bad on special demurrer. *Semble*, that the plea was bad, for not stating the circumstances of the fraud or misrepresentation.

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the said promissory note through and by means of the fraud, covin, and misrepresentation of the plaintiff and others in collusion with him.

Replication, that defendant did not make the said promissory note through and by means of the fraud, covin, and misrepresentation of the plaintiff, &c.

Special demurrer, on the ground that the replication should have alleged that the note was not made by fraud, covin, or misrepresentation.

Martin, in support of the demurrer. The replication is bad; the traverse should have been in the disjunctive, and not in the conjunctive, 1 *Chit. Plead.* p. 615, 6th ed. [*Parke*, B.—The traverse is bad, because it renders it incumbent on the defendant to prove the whole allegation; whereas the defendant would be entitled to succeed if the note were made either by covin or misrepresentation. The question is, whether the plea is good on general demurrer. Should not the circumstances of the fraud or misrepresentation be fully stated?] The plea is in accordance with the form in general use, and from the observations of Lord *Ellenborough*, in *Hill v. Montagu* (a), it would seem to be sufficient.

PARKE, B.—The reason assigned in 9 *Co.* p. 110, and *Plowden*, p. 54, b, for not alleging the circumstances, is, “because covin is secret, whereof by intendment, another man cannot have knowledge.” I have very strong doubts whether such a plea would be good on special demurrer on account of the word misrepresentation; unless it were a fraudulent misrepresentation, it would afford no defence. But as the replication is bad, the plaintiff had better amend on the usual terms.

Kennedy, for the plaintiff, consented to amend.

Amendment accordingly.

(a) 2 M. & S. 378.

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STEELE v. HARMER, BENHAM and LAYTON.

ASSUMPSIT by indorsee against acceptors of a bill of exchange drawn by one Wood.

The defendants, Benham and Layton, being under terms of pleading issuably, pleaded (amongst others) the following pleas.

That after the defendants had accepted the said bill, and before it came due, and before it was indorsed to the plaintiff, to wit, on, &c., the said William Wood waived the acceptance of the said bill, and exonerated and discharged the defendants from the same, and from the payment of the said bill; of all which premises the plaintiff, before and at the said time of the said indorsement of the said bill to the plaintiff, had notice and knowledge. Verification.

That after the making and accepting of the said bill, and before it came due, to wit, on, &c., the same was delivered, so accepted by the defendants, to W. Wood, and that after the said bill was so accepted and delivered, and while the said W. Wood was the holder and payee thereof, and before it became due, to wit, on, &c., the said W. Wood indorsed the bill to J. Harmer (the other acceptor) and then delivered it, so indorsed, to J. Harmer, with the intention of divesting himself, and thereby did divest himself of all rights, title, &c. in the bill, and of the right of suing thereon, when the same should become due, and of indorsing the same again: that when the bill was so indorsed to Harmer, it was indorsed for a good and valuable consideration then paid to Wood; that Harmer continued to be, and was the holder and possessor of, and the person entitled to, the said bill always, from the time of the indorsement thereof by Wood, until the bill was afterwards, to wit, on, &c., delivered by Harmer to the plaintiff; that the indorsement in the declaration mentioned consisted merely of the said last mentioned delivery by Harmer to the plaintiff, and that the

In an action by indorsee against acceptors of a bill of exchange, the defendants, who were under terms to plead issuably, pleaded (amongst others) the following pleas. That after acceptance, and before indorsement, the drawer waived the acceptance, and discharged the defendants from payment thereof, of which the plaintiff had notice.

That after the bill was accepted and delivered to the drawer, he indorsed it to one of the acceptors for consideration, and that such acceptor afterwards delivered it to the plaintiff, who had notice of the facts.

Held, that the above were issuable pleas.

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bill was never indorsed by Wood otherwise than as in this plea mentioned; and that before and at the time when the said bill was delivered to the plaintiff by Harmer, the plaintiff had notice of all the facts, &c. in this plea mentioned.

The plaintiff having signed judgment on the ground that the pleas were not issuable;

Jervis obtained a rule nisi, to set aside the judgment for irregularity, against which

Martin shewed cause. The pleas afford no answer to the action, but raise perfectly immaterial issues. As to the first, the waiver of the acceptance by the drawer does not defeat the right of the indorsee to enforce payment. The acceptor of a bill of exchange contracts to pay any person who is the holder of the bill at the time it becomes due. The obligation thus imposed cannot be discharged unless by payment, accord and satisfaction, or by release. The second plea is also non issuable. It attempts to set up as an answer the delivery of the bill by the drawer to one of the acceptors. But that circumstance is immaterial, inasmuch as the bill was indorsed to the plaintiff before it became due, and there is nothing to shew that he is not a holder for value.

Jervis, in support of the rule. The first plea is good. The liability of an acceptor, though complete, may be discharged by an express renunciation of his claim upon the part of the holder; *Byles on Bills of Exchange*, 147. The plea shews, that before the indorsement to the plaintiff, the drawer waived the acceptance, and, consequently, the liability of the defendant was discharged. The second plea is also good. The delivery of the bill to one of the acceptors was equivalent to a payment by all, and the right of action being extinguished before indorsement, the plaintiff could not acquire any title to sue on the bill. It is clear that the holder of a bill of exchange may discharge the

liability of the acceptor by parol; *Stevens v. Thacker* (a); *Whatley v. Tricker* (b). If the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note even by a person to whom the executor has indorsed; *Freakley v. Fox* (c). In this case the same consequence will follow from the delivery of the bill to the acceptor. This is not the case of a mere suspension of the remedy as in *Richards v. Richards* (d), but an absolute extinguishment of the debt. At all events, the question is fairly arguable.

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PER CURIAM.—We think the judgment ought to be set aside without costs. An issuable plea has been defined as one on which the parties may dispose of the merits of the case either upon the law or fact. It is true that a plea may ultimately turn out to be bad, but it is not therefore non issuable, for in that case there could be no issuable plea, unless it were also a good plea. In this case there is sufficient to warrant us in setting aside the judgment.

Rule absolute, without costs.

(a) Peake's N. P. C. 187.

4 M. & R. 18.

(b) 1 Campb. 35.

(d) 2 B. & Ad. 447.

(c) 9 B. & C. 130; See S. C.

LEAF v. TOPHAM and Another.

(*Coram Parke, B., sitting alone.*)

CASE for the infringement of a patent, of which the plaintiff was assignee. The patent, which had been granted to one J. V. Desgrand, was for "a certain method of weaving elastic fabrics."

In an action for the infringement of a patent, the notices of objection were, first; that the patentee

did not, by the specification, sufficiently describe the nature of the invention; secondly, that he had not caused any specification sufficiently describing the nature of the invention to be enrolled: *Held*, that the last objection was not sufficiently precise.

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The defendant pleaded (amongst other pleas) **sixthly**: that the said J. V. Desgrand did not, by the said specification and instrument in writing, under his hand and seal, in the declaration mentioned, particularly describe and ascertain the nature of the said supposed invention. **Seventhly**; that the said J. V. Desgrand did not, within six calendar months next, and immediately after the date of the said supposed letters patent, cause any instrument in writing under his hand and seal, particularly describing the nature of the said invention, to be enrolled in Chancery.

The defendant delivered with his pleas, under the 5 & 6 Wm. 4, c. 83, s. 5, the following (amongst other) notices of objections.

That the said J. V. Desgrand did not, by the said specification, particularly and sufficiently describe and ascertain the nature of the said supposed invention, and in what manner the said supposed invention was and is to be performed.

That the said J. V. Desgrand has not caused any specification or instrument in writing under his hand and seal, particularly and sufficiently describing and ascertaining the nature of the said supposed invention, and in what manner the same was and is to be performed, to be duly enrolled in the High Court of Chancery.

Bovill had obtained a rule, calling on the defendant to shew cause why he should not deliver farther and better particulars of his objections, or why the notice of objections already given should not be amended.

Hindmarsh shewed cause. The notices of objections are sufficiently precise. The only question arises upon the last, and the plaintiff will perhaps rely on *Jones v. Berger* (a); but that case has in effect been overruled by the Court of

(a) 5 M. & G. 208; See S. C. 6 Scott, N. R. 208.

Common Pleas in *Bentley v. Keighley* (a). In *Heath v. Unwin* (b), the notices of objection were as general as the present, but they were held good. To require more, would be to compel the defendant to set out his evidence.

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Bovill, in support of the rule, was not called upon.

PARKE, B.—The last objection is obscure and uncertain. It may mean either that no specification whatever has been inrolled; or that, though a specification has in fact been inrolled, it is defective, in not sufficiently describing the nature of the invention. It certainly is not necessary that the objections should set out evidence; but they ought to be more specific than this one. The notices of objection were required by the Legislature at the time the general issue was the usual plea; and were, no doubt, intended to stand in the place of a special plea. The defendant had better amend his last objection. The rule will be absolute, the costs to be costs in the cause.

Rule absolute.

(a) *Ante*, vol. 1, p. 944.

(b) 2 Dowl. N. S. 482; See S. C. 10 M. & W. 684.

EVANS v. The DUBLIN and DROGHEDA RAILWAY
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ON the 12th of December, 1844, the plaintiff sued out of this Court a writ of summons in an action of debt, directed to "The Dublin and Drogheda Railway Company, a director of which company, to wit, Peter Eckersley, is resident in the city of Westminster, in the county of Middlesex." On the same day the writ was personally served in London on Eckersley, who immediately placed

A statute incorporating a company for making a railway in Ireland, enacted, that personal service of process upon the clerk or secretary, or leaving the same at the office of the company, or of a secretary or clerk, or delivering the same to an inmate at such office, or at the last or usual place of abode of the secretary or clerk, or in case the same respectively should not be found or known, then personal service upon any agent or officer of the company, "or on any one director of the company," &c., "should be deemed good and sufficient service:" *Held*, that personal service of a writ of summons upon a director in *England* was null and void.

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it in the hands of his solicitors, Messrs. Palmer and Nettleship, with instructions to take such steps only as should be absolutely necessary. On the 14th of December Messrs. Palmer and Nettleship gave notice to the plaintiff solicitors, Messrs. Sharpe, Field and Jackson, that counsel had advised that the service of the writ of summons was not being in accordance with the provisions of the statute incorporating the company (6 & 7 Wm. 4, c. cxxxii). Nevertheless, the plaintiff's solicitors, on the 20th of January, entered an appearance for the defendants according to the statute; and, on the 22nd of January, obtained from *Alderson*, B., an order to allow the plaintiff "to affix copy and notice of declaration in the office of the Exchequer of Pleas, and also to leave a true copy thereof at the office of Messrs. Palmer and Nettleship, and that the same be deemed good and sufficient notice of such declaration to the defendants." The declaration and notice were served accordingly, and on the 23rd of January, Messrs. Palmer and Nettleship forwarded them to the solicitors of the company in Dublin. On the 11th of February, the plaintiff signed judgment; whereupon Messrs. Palmer and Nettleship applied on behalf of the company to a Judge at Chambers, to set aside the judgment for irregularity; and the following order was made by *Platt*, B.

"On hearing counsel, &c., and reading, &c., I do order that on payment of costs within five days, the judgment signed herein be set aside, the defendants pleading issuably within ten days; and that in default of payment of the said costs within the time aforesaid, the defendants' application to set aside the judgment be discharged, with costs to be paid by the defendants to the plaintiff, or to Messrs. Sharpe & Co their attorneys."

This order having been drawn up and served;

Peacock obtained a rule nisi to set aside the judgment and all subsequent proceedings. The affidavits in support of the application stated that the cause of action (if any) arose in Ireland; and also that the office of the Dublin and

Drogheda Railway Company, ever since its incorporation, had been and was at No. 22, Marlborough Street, Dublin, in the kingdom of Ireland; and that the deponents believed this to be well known to the plaintiff, and well known generally: that the company never had any secretary, office, clerk, or place of business in England, nor any director there representing or acting for the company. The affidavits on the other side denied that the cause of action arose in Ireland.

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Crompton shewed cause. First, there has been a good service of the writ of summons. The 184th section of the 6 & 7 Wm. 4, c. cxxxii. enacts, "that in all cases in which it may be necessary for any person or corporation to serve any summons or demand, or any notice, or any writ or other proceeding at law or in equity, upon the said company, personal service thereof upon a secretary or clerk of the said company, or leaving the same at the office of the said company, or of a secretary or clerk, or delivering the same to some inmate at such office of the company, or at the last or usual place of abode of such secretary or clerk, or in case the same respectively shall not be found or known, then personal service thereof upon any other agent or officer employed by the said company, or on any one director of the said company, or delivering the same to some inmate of the last or usual place of abode of such agent or officer or director, shall be deemed good and sufficient service of the same respectively on the company." That section allows a director of the company to be served anywhere, and its meaning is, that where process can be served, such service shall be deemed good service. [*Pollock*, C. B.—Suppose one of the directors was in Bengal, would service on him there be good service? *Parke*, B.—You have no right to serve a director at all, unless you have made every effort to serve the secretary or clerk of the company.] The defendants submit to the jurisdiction of the Court by appearing here. [*Pollock*, C. B.—They come now because you have a judgment against them upon

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which you may bring an action in Ireland; but if an action were brought on this judgment, it might be treated as a nullity (a).] The company had notice of the service of the writ and declaration. [*Pollock*, C. B.—But they protested against the proceedings, and you had no right to go on.] At all events, the application is too late, for it appears that the company had cognizance of the irregularity on the 23rd of January; *Archbold's Practice*, 1047, 7th ed. [*Pollock*, C. B.—Where a writ has been served on one person instead of another, and the plaintiff proceeds to judgment, is there any case to shew that there is a limit to the time for applying to set aside the judgment?] The party must shew that it did not come to his knowledge before. [*Rolfe*, B.—Is there any instance in which a service in this country on the brother of a defendant who is abroad, has been deemed good service; simply because the party abroad has had perfect knowledge of what has been going on? The statute says, that service shall be effected on the secretary or clerk, &c.; therefore the irregular service here can only be made good by supposing it a service in Ireland. *Parke*, B.—The defendants being a corporation, there must be some agent to act for the corporate body, and the statute speaks of those persons as resident in Ireland; therefore, for the purpose of service of process, it is the same as if the company were an Irishman residing in Dublin, who was served, and who is not amenable to the Courts at Westminster until he comes within their jurisdiction. Suppose, then, the case of an Irishman living in Dublin, and the service on a person in England, who had no authority to bind him, would it not be competent for him to come and move to set it aside?]

Peacock was not called upon to support the rule.

POLLOCK, C. B.—Under this act of Parliament there cannot be a good service on a director in England. The rule must be absolute, without costs.

Rule absolute.

(a) See *Ferguson v. Mahon*, 11 A. & E. 179; See S. C. 3 P. & D. 143.

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FISHER v. GIBBON.

DEBT by payee against maker of a promissory note, with a count on an account stated.

Plea: that after the 31st of October, next ensuing the making and passing of a certain act of Parliament made and passed in a session of Parliament, held in the fifth and sixth years of the reign of her Majesty Queen Victoria, intituled, "An Act for the Relief of Insolvent Debtors," and before the making and passing of another act of Parliament, &c. (7 & 8 Vict. c. 96,) for the amendment of the former act, and before the commencement of this suit, to wit, on, &c., a petition for protection from process was by the defendant duly presented, according to the provisions of the first mentioned act: that upon and in the matter of the said petition, afterwards and before the commencement of this suit, and before the making and passing of the 7 & 8 Vict. c. 96, to wit, on, &c., a final order for protection and distribution was made by M. B. Bere, Esq., a commissioner duly authorized in that behalf. And the defendant further saith, that the said debts in the several counts of the declaration mentioned, were respectively contracted before the date of the filing of the said petition. Verification.

To an action on a promissory note, the defendant pleaded, that after the 5 & 6 Vict. c. 116, came into operation, and before the 7 & 8 Vict. c. 96, a petition for protection from process was by him duly presented, and a final order for protection and distribution made by a commissioner duly authorized; and that the debts in the declaration were contracted before the filing of the petition: *Held* bad, on special demurrer.

Special demurrer, assigning for causes that the plea did not contain any allegation of the day or year when the debts were contracted: that it did not appear with sufficient certainty from the plea that the petition contained such matters as were required by the statute: nor that the order was made before the passing of the second act: nor whether the petition was presented to the Court of Bankruptcy in London, or to a commissioner of bankruptcy in the country: nor that the final order was made for the protection of the person, and the distribution of the estate and effects of the defendant; or that the final order at all concerned the

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defendant or his personal estate or effects: nor that the commissioner was duly authorized to make the said final order: nor whether at the time of presenting the petition the defendant was or was not a trader: nor whether or not he owed debts amounting in the whole to less than 300*l*: nor whether or not the defendant had complied with the other provisions of the first statute, which are thereby rendered necessary to be complied with, in order to enable him to present the said petition: that the plea did not express whether it was pleaded, or whether the defendant intended to rely on it as being pleaded, under and by virtue of the statute in the plea first mentioned.

Pashley appeared to support the demurrer, but the Court called on

Corrie, to support the plea. The plea is framed under the 10th section of the 5 & 6 Vict. c. 116, which provides and enacts, "that if any suit or action is brought against any petitioner, for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." The language of that section is nearly identical with that of the 126th section of the Bankrupt Act (6 Geo. 4, c. 16), which enacts, "that any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim or demand hereby made proveable under the commission against such bankrupt, shall be discharged upon common bail, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence, and such bankrupt's certificate, and the allowance thereof shall be sufficient evidence of the trading,

bankruptcy, commission and other proceedings precedent to the obtaining such certificate," &c.

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PLATT, B.—That section gives a general form of plea.

POLLOCK, C. B.—You may have liberty to amend, on the usual terms.

Pashley referred to *Leaf v. Robson* (a).

Amendment accordingly.

(a) *Ante*, p. 646.

TURNER v. LAMB.

COVENANT by lessor against lessee for not repairing. The declaration stated, that by a certain indenture made between the plaintiff of the one part, and the defendant of the other part (profert), the plaintiff, for the considerations therein mentioned, did demise, lease, set, and to farm let unto the defendant, his executors, &c., a certain messuage, tenements, and premises, with the appurtenances, more particularly mentioned and described in the said indenture. It then set out the covenant to repair, and assigned breaches.

Semble, in covenant for non repair, the declaration should state the term for which the premises were demised.

Special demurrer, on the ground that it did not appear for what term the premises were demised.

Pearson, in support of the demurrer. It ought to appear by the declaration what is the length of the term demised. That may not be necessary in an action for non-payment of rent; but it is in an action for dilapidations, since the jury cannot otherwise assess the damage. The precedent in the case of *Thursby v. Plant* (a), sets out both the term

(a) 1 Wms. Saund. 230, b.

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and the parcels. This declaration is not sufficiently certain *Ashby v. Harries* (a). [Parke, B.—The question is, whether there is any difference in the measure of damages, if the tenant held for one year, or for a thousand years: if so, the declaration ought to be more particular. In *Vivian v. Campion* (b), which was an action by the heir on the demise of his ancestor, the breach assigned was, that on the 1st of April, and for ten years before then, the premises were out of repair; and Lord Holt says, “If the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it is a damage to the heir, and the jury give as much in damages as will put the premises in repair; but hereby no damages are given in respect of the length of time they continued in decay; but in respect of what it will cost at the time of the action brought to put the premises in repair; therefore ‘per decem annos,’ was frivolous.”] The allegation that a lessor is possessed for the remainder of a certain term of years, is material and traversable; *Carvick v. Blagrove* (c). He also cited *Cooper v. Blick* (d); *Ireland v. Johnson* (e).

Ogle, contra. The declaration is according to the precedents in 2 *Chit. Plead.* 393, 7th ed., and the direction given in the note of Mr. Serjt. Williams to the case of *Thursby v. Plant*. It is clear that it is not necessary in such cases to set out the extent of the term. [Parke, B.—Not only where the quantum of damage depends upon the length of the term. Alderson, B.—Where a person has demised premises, the damages by non-repair may be very different if the reversion comes to him in six months, or nine hundred years. Lord Holt’s doctrine would start

(a) 5 Dowl. 742; See S. C. 2 M. & W. 673.

(b) Salk. 141. See, however, a very different report of the same case in 2 Ld. Raym. 1125.

(c) 1 B. & B. 531; See S. C.

4 Moore, 303.

(d) 2 Q. B. 915; See S. C. 2 & D. 295.

(e) 1 Bing. N. C. 162; See S. C. 4 M. & Scott, 706.

any person to whom the proposition was put.] Suppose the declaration had alleged that the plaintiff demised for a certain term, to wit, twenty-one years, and it appeared at the trial that the demise was for seven years, would that be a variance? [*Alderson*, B.—That is the whole question: if the allegation were material, there would be a variance. *Parke*, B.—The jury ought to see, on the face of the record, what it is they are to give damages for. If what I have cited from the judgment of Lord *Holt* be correct, it seems to follow that the damages must in all cases be the same: but there must surely be some difference between a term of one year and ten years; between an estate for life and an estate for years. I do not mean to give any decided judgment on the case, but only to say that it is worthy of consideration; the parties had better amend.]

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Pearson consented to withdraw the demurrer and plead, and *Ogle* to amend, by stating the term.

THOMAS v. HUDSON.

CASE against the keeper of the Queen's prison for an escape. The declaration stated (in the usual form) that the plaintiff, having recovered judgment in this Court against one Thomas Foulkes, in an action for an assault and false imprisonment, with 150*l.* 3*s.* 7*d.* damages and costs, sued out a writ of fieri facias, under which he obtained only 5*l.* 5*s.*: that he afterwards sued out a writ of capias ad satisfaciendum for the residue of his damages and costs, under which ca. sa. Foulkes was taken by the sheriff of Middlesex; and having been afterwards, on the 8th of July,

A defendant in execution for the damages and costs recovered in an action of assault and false imprisonment, petitioned the Court of Bankruptcy under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. A commissioner

made an order for his discharge. In an action against the keeper of the Queen's prison for an escape: *Held*, that whether this was or was not a debt from which the commissioner had power to discharge the prisoner; the gaoler was not liable for an escape, inasmuch as he acted in obedience to the order of a Judge in a matter over which he had jurisdiction.

Semble, that a commissioner of bankruptcy has no power under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, to order the discharge of a person in custody for damages recovered in actions of tort.

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1844, brought up by habeas corpus, was regularly committed by *Gurney, B.*, to the Queen's prison, in execution for the residue of the sum of 150*l.* 3*s.* 7*d.* The declaration then averred, that the defendant being keeper of the said prison, received the said Foulkes, and had him in custody on the said commitment, and afterwards wrongfully suffered him to escape.

The defendant pleaded, that Foulkes, after his said commitment in execution, to wit, on, &c., presented his petition to the Court of Bankruptcy, praying relief under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, with a schedule of his debts annexed to the petition, such schedule including the sum due to the plaintiff: that at the time of presenting the said petition, Foulkes was not, nor ever had been, a trader; and that he was at the time a prisoner, in execution on a judgment obtained by one Richard Croft, for a debt of 200*l.*; that after the petition was presented, John Evans, one of the commissioners of the Court of Bankruptcy, gave the petitioner an interim order of protection; and afterwards, and while Foulkes was in defendant's custody, namely, on the 1st of October, 1844, made an order on defendant to discharge Foulkes, in obedience to which order defendant discharged him. The plea then averred that the defendant had no notice of the nature of the plaintiff's action, save as it appeared from the habeas corpus under which Foulkes was brought up before *Gurney, B.*, and the sheriff's return; by which latter document the sheriff stated that he had Foulkes in custody under a writ of ca. sa., to satisfy the plaintiff a sum of 146*l.* 6*s.*, residue of 150*l.* 3*s.* 7*d.* damages in the said writ mentioned. Quæ est eadem, &c. Verification.

General demurrer and joinder.

Martin, in support of the demurrer. The plea affords no answer to the action, inasmuch as Foulkes was in custody for the damages recovered in an action of assault and false imprisonment. In such a case the commissioner

had no jurisdiction to make the interim order under which Foulkes was released from prison. The 5 & 6 Vict. c. 116, s. 1 (a), enables any person not being a trader, or being a trader and owing less than 300*l.*, to present a petition to the Court of Bankruptcy, stating the debts owing by and to him; and thereupon the commissioner to whom the same

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(a) Sect. 1 enacts, "that if any person not being a trader within the meaning of the statutes now in force relating to bankrupts, or if any person being such trader, but owing debts amounting in the whole to less than three hundred pounds, shall give notice, according to the schedule to this act annexed, to one-fourth in number and value of his creditors, and shall cause the same notice to be inserted twice in the *London Gazette*, and twice in some newspaper circulating within the county wherein he resides, he may present a petition for protection from process to the Court of Bankruptcy, if he has resided twelve calendar months in London or within the London district, or to the commissioner of bankrupt in the country within whose district he may have resided twelve calendar months, which petition shall have annexed to it a full and true schedule of his debts, with the names of his creditors, and the dates of contracting the debts, severally, the nature of the debt, and the security (if any) given for the same, and also of the nature and amount of his property, and of the debts owing to him, with their dates, and the names of his debtors, and the nature of the securities (if any) which he may have for such debts, and which petition shall also set

forth any proposal which he may have to make for the payment, in whole or in part, of his debts; and it shall thereupon be lawful for the judge or commissioner of the Court of Bankruptcy to whom, by any order of the Court, as herein-after provided, the same shall be referred, or for the commissioner in the country to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner from all process whatever, either against his person or his property of every description, which protection shall continue in force, and all process be stayed, until the appearance of the petitioner in Court, as herein-after provided; and upon the presentation of any such petition all the estate and effects of the petitioner shall forthwith become vested in the official assignee who shall be nominated by the commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit; and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts."

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shall be referred, may grant the petitioner a protection from all process whatever, either against his person or his property, which protection continues in force until the appearance of the petitioner in Court for examination. It having been decided that the 5 & 6 Vict. c. 116, did not apply to persons in custody; *Culpepper v. Joy* (a); the 7 & 8 Vict. c. 96, extended its provisions to persons in execution for debts. The sixth section of that statute declares and enacts, "that any prisoner in execution upon any judgment obtained in any action for the recovery of any debt, either not being a trader within the meaning of the statutes relating to bankrupts, or being a trader within the meaning of the said statutes owing debts amounting on the whole to less than three hundred pounds, may be a petitioner for protection from process; and every such petitioner to whom an interim order for protection shall have been given shall not only be protected from process, as provided by the said recited act, but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule; and if any such petitioner, being a prisoner in execution, shall be detained in prison in execution upon any such judgment, it shall be lawful for the commissioner to order any officer who shall have such petitioner in custody by virtue of such execution to discharge such petitioner out of custody as to such execution, without exacting any fee, and such officer shall hereby be indemnified for so doing; and no sheriff, gaoler, or other person whatsoever shall be liable to any action as for the escape of any such prisoner by reason of such his discharge; and such petitioner so discharged shall be protected by his interim order from all process for such time as the commissioner shall by such interim order or any renewal thereof think fit to appoint, until the making of the final order for protection, in the same manner as if such petitioner had not been a prisoner in execution: provided

(a) 4 Q. B. 172; See S. C. 3 G. & D. 619.

always, that after the time allowed by any such interim order or any renewal thereof (as the case may be) shall have elapsed such petitioner shall not by such discharge be protected from being again taken in execution upon such judgment, but such judgment shall remain in full force and effect notwithstanding such discharge." That this section does not include a case like the present, but is confined to executions on judgments for debts, is evident from the 22nd, 23rd, and 24th sections (a). The

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(a) Sect. 22. "That the final order to be made under the provisions of the said act as amended by this act shall protect the person of the petitioner from being taken or detained under any process whatever in the cases herein-after mentioned; (that is to say), from all process in respect of the several debts and sums of money due or claimed to be due at the time of filing the petition from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule: provided always, that every such final order may be made without specifying therein any such debt or debts, or sum or sums of money, or claims as aforesaid, or naming therein any such creditor or creditors as aforesaid, and such

final order shall be in the form specified in schedule (A. No. 3)."

Sect. 23. "That if any such petitioner, being a prisoner in execution at the time of filing his petition, shall be detained in prison for any debt or claim in respect of which he is protected from process by his final order, it shall be lawful for the commissioner to order any officer who shall have such petitioner in custody by virtue of such execution to discharge such petitioner without exacting any fee; and such officer shall be hereby indemnified for so doing."

Sect. 24. "That if on the day for the first examination of the petitioner, or at any adjournment thereof, it shall appear to the commissioner that the debts of the petitioner, or any of them, were contracted by any manner of fraud or breach of trust, or by any prosecution whereby he had been convicted of any offence, or without having at the time a reasonable or probable expectation of being able to pay such debt or debts, or that such debts, or any of them were contracted by reason of any judgment in any proceeding for breach of the

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authorities establish, that a gaoler who allows a prisoner to go at large in obedience to an order for that purpose, is not protected, unless the Court had jurisdiction to make the order. In *Colston v. Ross* (a), which was an action against the sheriffs of York for an escape, the defendants pleaded that they let the prisoner at large by reason of a writ of privilege awarded by the council of York; and the plaintiff thereupon demurred, because they did not allege the authority of the council. The Court held that "the bar was not good, and that the sheriffs, although they let him at large by colour of the writ of privilege, yet the writ not being a good warrant, they are responsible to the plaintiff; for they, at their peril, are to take heed what warrant they had to let him out of custody." There is an anonymous case (b) in which, in an action of debt for 200*l.* on bond, conditioned to pay 100*l.*, the defendant was committed to the marshal for want of bail, and he applied to the justices of the peace of Surrey, and procured a discharge under the then act for the Relief of Insolvent Debtors (c). The plaintiff obtained an escape warrant, upon which the defendant was taken up, and,

revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat of bankruptcy, or malicious trespass, or that the petitioner has parted with any of his property since the presenting of his petition, the commissioner shall not be authorized in any such case to name any day for making such final order, or to renew such interim order; and in every such case wherein any such petitioner shall have been a prisoner in execution, and discharged out of custody by order of the commissioner under the provision

herein in that behalf contained, such petitioner shall be remanded by an order of the commissioner to his former custody; but if none of the matters aforesaid shall so appear, and the commissioner shall be satisfied that the petitioner has made a full discovery of his estate, effects, debts and credits, it shall then be lawful for the commissioner to cause notice to be given that on a certain day, to be named therein, he will proceed to make such final order, unless cause be shown to the contrary."

(a) Cro. Eliz. 893.

(b) 1 Salk. 273.

(c) 2 & 3 Ann. c. 16.

upon a motion to be discharged, the Court held this was an escape; for being a prisoner both indebted and also charged in above 100*l.* debt and damages, the justices had no authority for what they did; and, therefore, the discharge was illegal and void. *Brown v. Compton* (a) is in point: there justices were authorized by the 37 Geo. 3, c. 112, under certain circumstances to discharge insolvents "at the first or second general quarter session or general session held after the passing of the act, or at some adjournment thereof." The justices discharged an insolvent at an adjournment of a session holden before the act passed; and the Court decided that the officer was not justified in obeying the order of session; and that the sheriff was answerable in damages to the plaintiff, at whose suit the insolvent was in custody, for the act of the gaoler in discharging the insolvent. *Grose, J.*, in delivering judgment there says, "I take it to be a clear proposition that if a Court, not having jurisdiction, order an officer to do an act, and the officer obey the order, he is not justified. I confess I was surprised when the case from 1 *Lord Raymond* was cited; (*Orby v. Hales*) (b) because, if it were law, it would overturn the *Marshalsea case*, (c) and all the other authorities on the subject." *Saffery v. Jones* (d) will perhaps be cited on the other side, but the 81st section of the Insolvent Act (7 Geo. 4, c. 57) upon which that case arose, indemnified the gaoler for any thing done by him in obedience to any order of the Court. *Savory v. Chapman* (e) shews that a gaoler is bound to see that he has lawful authority for the discharge of a prisoner. It is not enough that the commissioners had a general jurisdiction, but there must also be a jurisdiction in the particular case; *Mitchell v. Forster* (f). If that does not exist, the gaoler is not justified in acting under the order. In this case, it is clear

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(a) 8 T. R. 424.

(b) 1 *Ld. Raym.* 3.(c) 10 *Rep.* 68.

(d) 2 B. & Ad. 598.

(e) 11 A. & E. 829; See S. C. 3 P. & D. 604; 8 *Dowl.* 656.

(f) 12 A. & E. 472; See S. C. 4 P. & D. 150.

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that he had notice of the want of authority in the commissioner; for the plea states that he had no notice of the nature of the plaintiff's cause of action, except as it appeared from the habeas corpus cum causâ. A person who has notice of the existence of a judgment, has notice of its contents. He referred to *Jackson v. Rowe* (a).

W. H. Watson, contra. The defendant is protected by the 7 & 8 Vict. c. 96, s. 6. The commissioner had a general jurisdiction; and, although in this particular case he may have made an erroneous order, the defendant is not responsible for acting under it. Since the 1 & 2 Wm. 4, c. 56, the Court of Bankruptcy is a Court of record; and a commissioner of that Court has, in respect of matters within his jurisdiction, the same powers and privileges as a Judge of a Court of record. All doubt on that subject is removed by the 5 & 6 Wm. 4, c. 29, s. 25. Suppose a party comes before a commissioner, and there is some question whether the case is one over which he has jurisdiction, but he nevertheless adjudicates upon it; would not all persons acting under his order be protected by it? [*Alderson, B.*—That would depend upon whether he had jurisdiction to make the order; he cannot give himself jurisdiction by making the order.] If the order is good upon the face of it, the gaoler is not bound to inquire whether the commissioner had authority to make it. The general rule is, that an officer must look to the writ, and not to the judgment; and though the judgment does not warrant the writ, he may justify under it. In this case, the gaoler could have no knowledge of the nature of the action; for the roll was not carried in, and it would not appear from the writ that the action was for an assault. The gaoler would be liable in trespass, if he were to keep a prisoner in custody until he had informed himself as to whether the judgment was recovered in an action for a debt. It must be left to the discretion of the Court to determine what cases

(a) 2 Sim. & Stu. 472.

are within its jurisdiction. The argument on the other side must go to this extent, that if after a trader was discharged upon an interim order, it should turn out that his debts exceeded 300*l.*, the gaoler would be responsible for having obeyed the order. Supposing this Court put an erroneous construction on an act of Parliament, would not the officers of the Court be bound to obey it? Or, if a *ca. sa.* issued without a judgment to support it, would not the sheriff be justified in acting under it? [*Alderson, B.*—He would be justified, because the Court has jurisdiction to issue a *ca. sa.*] The 24th section of the 7 & 8 Vict. c. 96, shews that it is the commissioner who is to determine whether or not the action is for a debt: that section enacts, that “if on the day for the first examination of the petitioner, or at any adjournment thereof, it shall appear to the commissioner that the debts of the petitioner, or any of them, were contracted by any manner of fraud or breach of trust, or by any prosecution whereby he had been convicted of any offence, or without having at the time a reasonable or probable expectation of being able to pay such debt or debts, or that such debts, or any of them, were contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat of bankruptcy, or malicious trespass, or that the petitioner has parted with any of his property since the presenting of his petition, the commissioner shall not be authorized in any such case to name any day for making such final order, or to renew such interim order; and in every such case wherein any such petitioner shall have been a prisoner in execution, and discharged out of custody by order of the commissioner under the provision herein in that behalf contained, such petitioner shall be remanded by an order of the commissioner to his former custody; but if none of the matters aforesaid shall so appear, and the commissioner shall be satisfied that the

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petitioner has made a full discovery of his estate, effects, debts, and credits, it shall then be lawful for the commissioner to cause notice to be given that on a certain day, to be named therein, he will proceed to make such final order, unless cause be shown to the contrary." It is evident, from that section, that the commissioner has jurisdiction to make an interim order in all cases; and if it should afterwards appear that the prisoner was in custody by reason of any of the causes enumerated; then the commissioner is to remand him. *Saffery v. Jones* (a) is an express authority to shew that a gaoler is justified in acting in obedience to the order of a Court of competent jurisdiction. *Marsh v. Woolley* (b) decided that an interim order under the 5 & 6 Vict. c. 116, if in the form prescribed in the rules promulgated by the Judges and commissioners of the Court of Bankruptcy, need not shew on the face of it the jurisdiction of the commissioner to make the order. In *Colston v. Ross* (c) there was a total want of jurisdiction; and in *Brown v. Compton* (d) the want of jurisdiction appeared on the face of the order. *Savory v. Chapman* (e) has no application to the present case; for there the marshal discharged the prisoner without any sufficient authority. *Andrews v. Marris* (f), and *Carratt v. Morley* (g), shew that an officer executing the process of a Court is protected, though the Court had no jurisdiction to issue the process. He also referred to *Moravia v. Sloper* (h); *Ex parte Partington* (i). *Nolan's* argument in the *Case of Thomas Picton* (k).

Martin, in reply. With respect to the argument that the gaoler would not be liable, if after an order for the discharge of a trader it should turn out that his debts

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| (a) 2 B. & Ad. 598. | (f) 1 Q. B. 3; See S. C. 1 G. & D. 268. |
| (b) 5 M. & G. 675; See S. C. 6 Scott, N. R. 555; <i>Ante</i> , vol. 1, p. 84. | (g) 1 Q. B. 18; See S. C. 1 G. & D. 275. |
| (c) Cro. Eliz. 893. | (h) Willes, 30. |
| (d) 8 T. R. 424. | (i) Q. B. M. T. 1844. |
| (e) 11 A. & E. 829; See S. C. 3 P. & D. 604; 8 Dowl. 656. | (k) <i>Howell's State Trials</i> , 940. |

exceeded 300*l.*; it is submitted that in such a case he would be liable. The case is analogous to what formerly took place under the Bankrupt Act. The Court adjudged a party to be bankrupt; but notwithstanding such adjudication, if it afterwards appeared that the fact was not so, all persons who acted under the authority of the Court, were liable to actions. The act of the Judge is the act of the law, and he is not responsible; but the act of the officer who obeys the order of the Judge is merely the act of an individual. If a commissioner adjudged a person to be bankrupt upon an insufficient petitioning creditor's debt, and directed the messenger to seize his property; would not the latter be liable to an action? [*Pollock*, C. B.—Commissioners of bankrupts were formerly persons having certain statutory authority, and if they did not pursue it they were responsible; but their liability has been altered by the late statute, which has made them a Court of record.] Secondly, it is evident, from the whole tenor of the statutes referred to, that the Legislature intended that the commissioner should have no jurisdiction except in cases of debt. Thirdly, the gaoler had notice of the nature of the action; for the forms of writs prescribed by the Judges pursuant to the 1 & 2 Vict. c. 110, shew upon the face of them for what the damages are recovered, whether for the non-performance of promises, or for a tort.

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Cur. adv. vult.

The judgment of the Court was afterwards(*a*) delivered by ALDERSON, B.—(After shortly stating the pleadings, his Lordship then proceeded:)—The question for our decision is, whether the order of Mr. Commissioner Evans afforded a good justification to the defendant for his discharge of Foulkes; and this depends on the question what powers were conferred on the commissioner by the recent statutes of the 5 & 6 Vict. c. 116, and the 7 & 8 Vict. c. 96. By the former statute it is enacted (section 1) that any person

(*a*) In Trinity Vacation.

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not being a trader, or being a trader and not owing debts to the amount of 300*l.* may, after giving certain notices, present a petition to the Court of Bankruptcy, praying protection from process, to which petition is to be annexed a schedule containing a full statement of his debts and assets of every description; and, on the filing of such petition, the commissioner is empowered to give to the petitioner a protection from all process, either against his person or his property, until his appearance in Court for examination, at a day to be appointed for that purpose, and on the presentation of the petition all the property of the petitioner becomes vested in the official assignee. The order so to be given is, pursuant to a certain rule framed under the authority of the act, called the Interim Order, and is in force only until the appearance and examination of the petitioner; but if the examination is not concluded at one sitting, it may be renewed from time to time until the final examination; on the completion of which, if the commissioner is satisfied of the truth of the allegation in the petition, and that the debts of the petitioner were not contracted by any fraud or breach of trust, or any criminal prosecution, or without reasonable prospect of being able to discharge them, or by reason of any judgment for breach of the revenue laws, or in certain enumerated actions of a criminal nature, including actions for assault; and is also satisfied that the petitioner has not, since his petition, parted with any of his property, he may give the petitioner a final order, protecting his person from all process, and vesting his estate in assignees for the benefit of his creditors. By the subsequent statute, 7 & 8 Vict. c. 96, it is enacted, in sect. 1, that the petition may be presented without the notices originally required; and by sect. 6 it is declared and enacted, that any prisoner in execution on any judgment obtained in any action for the recovery of a debt, not being a trader, or being a trader and owing debts under 300*l.*, may be a petitioner for protection from process; and every such petitioner to whom an interim order shall have been given, shall not only be

protected from process, but also from being detained in prison in execution on any judgment obtained in any action for the recovery of any debt mentioned in the schedule; and it shall be lawful for the commissioner to order any officer having any such petitioner in custody on any execution on any such judgment, to discharge him; and such officer shall not be liable to any action for an escape by reason of his so doing. These are the sections of the two acts on which the present question mainly turns. The plaintiff argued that they did not warrant the order of the commissioner; for that the only detainer in execution which the interim order for protection can reach, is a detainer in execution on a judgment for a debt; whereas here the judgment is a judgment in an action of assault and false imprisonment. The defendant, on the other hand, contended that the order extends to all sums mentioned in the schedule as debts; or if that be not so, at all events the defendant, the gaoler, was bound to obey the order, whether warranted by the statute or not; as being an order made by a Judge in a matter over which he had jurisdiction.

With regard to the first point, namely, what are the judgment debts, from detention on account of which, the Legislature meant that the interim order should be a protection, there is certainly some difficulty. Supposing the petition to be presented under the first statute by a party not in custody, it is clear the interim order, during its subsistence, would have been a protection from all process, not only in actions of debt and on contracts, but also in actions of tort. It is equally clear, that when the petitioner came before the commissioner for examination, he would have been unable to obtain a final order under sect. 4, unless he could satisfy the commissioner, amongst other things, that his debts were not contracted (which must mean that none of his debts were contracted) by reason of any judgment in, amongst other actions, any action of assault; and, as in this case one of his debts, namely, that which he owes to the plaintiff, certainly arises

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from the damages recovered in an action of assault, it would have been the duty of the commissioner to refuse the final order, and the present plaintiff would have been entitled to execute his *ca. sa.*, the interim order being no longer in force. The policy, therefore, of the Legislature in the first statute appears to have been to release the petitioner in the first instance from all apprehension of any arrest immediately on his presenting his petition, and so giving up all his property: though at the same time, if on a subsequent investigation of his affairs it should turn out that any of his debts were of a nature leading to the inference that his conduct had been criminal or fraudulent, he was no longer to be entitled to his protection. Such being the scheme of the first act, the second act, in the sixth section, extends the right of petitioning for protection from process to any prisoner in execution upon any judgment obtained in any action for the recovery of any debt; and proceeds to enact, that the interim order shall not only protect the petitioner from process, but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule, and the commissioner is authorized to order the gaoler to discharge him out of custody. The argument of the defendant was, that the Legislature meant by this sixth section to declare (for this clause is declaratory as well as enactive) that the circumstance of the petitioner not being at large should, in this respect, make no difference; and that as he would have been temporarily protected from process if he had been at large, so he should be temporarily set at large, if in confinement. Though this reasoning is not without its weight; yet, on the other hand, the words of the sixth section are very strong indeed in favour of the more limited construction contended for by the plaintiff. The enactment is, that the interim order shall protect the petitioner from being detained in prison in execution upon any judgment obtained in any action for recovery of any debt mentioned in his schedule. If

this had been the only part of the section in which these words had occurred, we might perhaps have been inclined to do some violence to the language; and to say that the provision applied to all sums due on judgments mentioned in the schedule as debts; but the same words "action for the recovery of any debt" occur in the beginning of the clause; and we think in that first part of the clause that they are clearly meant to apply exclusively to the judgment debts recovered in actions of debt; not perhaps confining the meaning of those words to actions of debt properly so called, but extending them also to judgments in actions on contract for sums popularly called debts; certainly however excluding the case of parties against whom judgment had been recovered in actions of tort. Now if this narrower construction be that which is to be adopted in the early part of the section, when the words are used for shewing to what class of judgment debtors in execution the right of petitioning is given, it is very difficult to say that a different and wider sense is to be attributed to them in the following sentence of the same section, where they are used to shew the debts, against detention for which, the interim order is to be a protection. The 22nd, 23rd, and 24th sections of the second act, to which we shall presently advert for another purpose, tend to confirm the construction contended for by the plaintiff; and, on the whole, if it were necessary to decide the point, we should probably feel bound to say that the plaintiff was right, and that the judgment debt against Foulkes was not one which the statute intended the interim order to affect.

It is not, however, absolutely necessary for us to come to any judicial decision on this point, inasmuch as we are of opinion that on the second point the argument of the defendant is clearly right, and that whatever be the true construction of the act, the defendant was bound to obey the order of the commissioner, as that of a Judge acting in a matter over which he had jurisdiction. The argument of the plaintiff was, that although the Court of the commis-

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sioner is now for certain purposes a Court of record; yet in cases under the two statutes in question, he is acting not as a Judge in discharge of his ordinary functions, but as a party exercising a special authority conferred on him by act of Parliament; and which authority, therefore, fails altogether, if attempted to be exercised in any case not strictly within the terms of the statute conferring it. The power, it is said, is only to discharge the party petitioning from imprisonment on "any such judgment;" that is, looking to the context, on a judgment obtained in an action for the recovery of a debt: and the commissioner, as to any judgment obtained in any other action than an action for the recovery of a debt, has no more power to order the prisoner's discharge, than he would have to order the discharge of a party who had not petitioned. Now, this argument, it must be observed, goes a great deal further than merely to limit the quality of the debts as to which the interim order shall be available. If good at all, it certainly shews that the order will only be available to "any such petitioner;" that is, looking to the context, to a petitioner who either was not a trader, or who, being a trader, did not owe so much as 300*l.*; and, under the first act, who had given certain notices thereby required. Now, although the gaoler might perhaps be able to ascertain whether the petitioner was in his custody on a judgment obtained in an action of debt, or an action of tort; yet it would be obviously impossible for him to ascertain whether any prisoner is in custody being a trader, owing debts exceeding 300*l.* The argument of the plaintiff must go to the full length of contending, that if a party in custody in execution on a judgment for a debt, should present a petition alleging that he was not a trader, or being a trader, that his debts were under 300*l.*, and should obtain his discharge, the gaoler, if the allegations of the petition are true, would be bound to discharge him; if false, to detain him; and that in the first case, if he did not discharge his prisoner, he would be liable to an action for false imprisonment; and, in the second, if he did

discharge him, he would be liable to an action for an escape. The course to be pursued by the gaoler is thus made to depend on the truth or falsehood of certain allegations, the truth or falsehood of which he has no means of ascertaining; so that without any default on his part, he may become liable to actions to any amount, and find himself ruined without the possibility of redress. This appears to us so nearly a *reductio ad absurdum*, that if there be any construction of the act by which such a consequence may be avoided, we feel bound to adopt it. Mr. *Martin* indeed contended that there was no such absurdity in the conclusion to which his reasoning necessarily led; or, at all events, that if it be an absurdity, it is only an absurdity which the law tolerates in many analogous cases; and he referred to the case of messengers, assignees, and others acting under commissions of bankruptcy, all of whom act on the fact of the adjudication, and who, except so far as modern statutes have protected them, are certainly responsible for all they do, if it should turn out that the party was erroneously adjudged to be bankrupt. There appears, however, to us to be a clear distinction between the two cases. In the cases suggested by Mr. *Martin*, the parties acting are all volunteers; they may act or not as they see fit; whereas in the case before us, the defendant has no choice. The debtor is in his custody by the act of the law, and the gaoler is bound to keep him, unless discharged by competent authority. The law, therefore, which should impose on him the obligation of acting at his peril as to the facts, would be very different from that which applies to the ordinary case of bankruptcy. In the one case the party must act; in the other, he may act, or may abstain from acting, as he may see fit. It only remains, therefore, to see whether the language of the statute is such as to justify us in saying that the Legislature meant in a case like the present, to make the judgment of the commissioner conclusive. Now, construing the two acts together, the petition, it is to be observed, must be accom-

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panied by an affidavit verifying its truth, and it must contain a statement that the petitioner is not a trader, or, if a trader, that his debts are under 300*l*. It must also contain a full account of his debts, stating their dates and nature, with certain other particulars. This petition so verified being thus before the commissioner, the first statute (sect. 1) enacts, that it shall thereupon be lawful for the commissioner to give the interim order of protection; and the second statute, that if any such petitioner shall be in execution on any such judgment, it shall be lawful for the commissioner to order the gaoler to discharge him. The words, it must be observed, are "it shall be lawful for the commissioner," &c., and we think this sufficiently shews that the commissioner is to act not ministerially, but judicially; he is to come to a decision on the petition and affidavit—not indeed a decision as to whether a petitioner having complied with the requisites of the act, shall, or shall not, have his interim order, or his order of discharge—for to these he is in such a case clearly entitled; but whether he has or has not done what the statutes impose as the conditions on which he should become entitled to those privileges. If the petition should on the face of it shew that the petitioner was a trader, and it should appear by the schedule that his debts amounted to 300*l*., it would certainly be the duty of the commissioner to withhold the interim order; and if a petitioner being in custody should become entitled to his interim order, it would yet be the duty of the commissioner to withhold his order of discharge in respect of any judgment, if such there should be, not coming within the description of a judgment obtained in any action for the recovery of any debt mentioned in the schedule. The commissioner, it is true, has but very imperfect means of enabling him to come to a decision on these matters—nothing but the petition and affidavit—still he has these documents, and on these he must exercise his judgment, and by that judgment all persons must be bound. The decision may be wrong, but it is a decision

by the proper authority; and, if wrong, comes within the principle laid down in the *Marshalsea case* (a), that orders by a competent authority, though made *inverso ordine*, are a protection of those who act under them. The correctness of this view of the statute seems to us to be strongly confirmed by some subsequent clauses. Section 7 enacts, that when any petitioner is a person in execution, and not entitled to his discharge under section 6, the commissioner may, by warrant, cause him to be brought up for examination. This shews that the commissioner is, on the facts before him, to decide whether the execution is or is not one in respect of which the petitioner is entitled to a discharge, and he is to act accordingly. Again, after the examination, the commissioner is, by section 23, to order the petitioner to be discharged from custody in respect of all debts to which the final order shall extend, that is all debts whatever except those which the commissioner shall decide to come within the exceptions contained in section 24. Now, here it is quite clear the commissioner was intended to exercise functions strictly judicial, and no one can doubt but that his adjudication as to the final order is absolutely conclusive; and, it appears to us, independently of all other considerations, to the last degree improbable, that the Legislature meant to give to one class of the commissioners' acts a character and effect different from that which is given to the others—to compel third persons to obey the final adjudication, and to protect them in that obedience—but, in the meantime, to leave them to act at their peril as to intermediate proceedings. The provisions in the latter part of section 24, which have been referred to in the argument, whereby the commissioner is directed to remand to custody any person who, on his examination, shall turn out to have been erroneously discharged under section 6, tend strongly to confirm us in the view we have taken of the statute.

On these grounds, therefore, being strongly inclined to go along with the plaintiff in his first proposition, namely, that

(a) 10 Rep. 68.

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GOSLIN v. COTTERELL.

(Coram Alderson, B., sitting alone.)

IN this case the amount of debt indorsed on the writ of summons was above 20*l*. The plaintiff, by his particulars of demand, claimed 17*l*. 6*s*. only. A writ of trial having been ordered by a Judge,

Where the amount indorsed on a writ of summons exceeds 20*l*., a Judge has no jurisdiction to

Pearson moved for a rule nisi to set aside the writ of trial, on the ground that under the circumstances, the Judge had no jurisdiction to order it. The 3 & 4 Wm. 4, c. 42, s. 17, enacts, "that in any action depending in any of the Superior Courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed twenty pounds, it shall be lawful for the Court in which such suit shall be depending, or any Judge of any of the said Courts, if such Court or Judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such Court or Judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought," &c. To bring the case within the statute, not only the sum sought to be recovered, but also the amount indorsed on the writ of summons, must not exceed 20*l*.

order a writ of trial; notwithstanding the sum claimed by the particulars of demand is less than 20*l*.

In such cases the Judges have resolved not to amend the writ.

Arnould shewed cause, and admitted, that as the writ stood, the cause could not be tried before the sheriff; but he submitted, on the authority of *Frodsham v. Round* (a), that the writ might be amended, by reducing the sum indorsed on it to the amount claimed by the particulars.

(a) 4 Dowl. 569.

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this debt was not one from which Foulkes ought to have been discharged by the commissioner; we yet think that he has no right of action against the defendant, who has only obeyed the order of a Judge in a matter over which he had jurisdiction. Our judgment must, therefore, be for the defendant.

Judgment for Defendant.

ROLLESTON v. DIXON, Executor of DIXON.

(*Coram Alderson, B., sitting alone.*)

In an action against an executor on a check drawn by his testator, the defendant may plead non assumpsit.

THIS was an action on a banker's check, drawn by one Dixon, deceased, of whom the defendant was executor. A summons had been taken out at Chambers to plead several matters, and amongst others, non assumpsit. The learned Judge refused to allow the plea of non assumpsit, on the ground that it was prohibited by the rule of Hil. Term, 4 Wm. 4, which provides, that in all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible.

Petersdorff had obtained a rule nisi to add that plea. He urged, that if it were not allowed, an executor might be personally liable.

Charnock shewed cause.

ALDERSON, B.—The plea is clearly admissible. The learned Judge did not advert to the distinction between a promise by the original party, and a promise by the executor. The rule must be absolute.

Rule absolute (a).

(a) See *Timmis v. Platt*, 2 M. & W. 720; S. C. nom. *Gilbert v. Platt*, 5 Dowl. 748.

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GOSLIN v. COTTERELL.

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(a) 4 Dowl. 569.

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ALDERSON, B.—The Judges have agreed that in case they will not amend the writ. If a party do indorse the writ for a larger amount than is due, not afterwards be allowed to change his mind and The rule must be absolute to set aside the writ of tr

Rule absolute

HODKINS v. COOK, Executrix of A. COOK.

Where a demurrer is set down for argument on the Monday, the parties have the whole of the preceding Wednesday to deliver the paper books.

A declaration on a promissory note payable more than six years ago, averred part payment within six years. A plea traversing such averment was held bad on special demurrer.

ASSUMPSIT by payee against executrix of maker of a promissory note for 100*l*. The declaration, after the making of the note in the usual form, averred although the said A. Cook, deceased, in his lifetime to the plaintiff the sum of 10*l* parcel of the said the said promissory note mentioned; yet the said A in his life, and the defendant executrix as aforesaid the death of the said A. Cook, have not, nor hath either of them, paid the residue of the said sum," &c. It appeared on the face of the declaration, that the note was issued more than six years ago; but the alleged payee within six years.

The defendant pleaded that the said A. Cook, deceased, did not pay to the plaintiff the said supposed sum of 100*l* or any part thereof, modo et formâ.

Special demurrer, assigning for cause that the plea was an immaterial issue.

On the 11th of January, the plaintiff set down his special demurrer for argument on Monday the 20th of January. On Tuesday the 14th, the plaintiff delivered his paper books, and on Wednesday the 15th, inquired whether the defendant had delivered his, and finding that he had done so, the plaintiff, on the same day, delivered his paper books to him. The defendant, at a later period of the day, delivered his paper books, conceiving that he had the whole of Wednesday to do so.

Huddleston appeared to support the demurrer, and objected that the defendant could not be heard, unless he paid the costs of the paper books delivered by the plaintiff for him. The question was, whether the delivery by the plaintiff on Wednesday was premature. The 7th rule of Hil. Term, 4 Wm. 4, orders that "four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior Judge of the Court in which the action is brought; and the defendant shall deliver copies to the other two Judges of the Court next in seniority; and in default thereof by either party, the other party may on the day following, deliver such copies as ought to have been delivered by the party making default," &c. Sunday being the last day, must be excluded from the computation; Reg. Hil. Term, 2 Wm. 4, r. viii.; and, consequently, the defendant should have delivered his books on the Tuesday.

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M^cMahon, contra, argued that the Sunday must be included; and, therefore, that the defendant had until Wednesday evening to deliver his books.

ALDERSON, B.—The Master reports that the practice is to deliver the paper books on Wednesday for argument on Monday.

Huddleston, in support of the demurrer, then argued that the averment in the declaration of part payment was not traversable; for, notwithstanding such averment, the defendant might plead the Statute of Limitations; *Hollis v. Palmer* (a).

(a) 2 Bing. N. C. 713; See S. C. 3 Scott, 265.

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M'Mahon, contra. The allegation of part payment has been inserted in order to obviate the difficulty of the note appearing on the face of the declaration to be barred by the Statute of Limitations. If the averment is material, the defendant has a right to traverse it.

POLLOCK, C. B.—Suppose the case of a promissory note for payment of 400*l.* by instalments of 100*l.* each, and the declaration alleged that the defendant paid the first and second instalments, but did not pay the third and fourth; would it be any answer for the defendant to plead that he had not paid the first or second instalments?

ALDERSON, B.—The plea is in effect this. “I have not paid you part of the note, and, therefore, am not liable to pay the residue.” It is scarcely arguable.

PLATT, B.—The plea is not in bar of the cause of action; for the cause of action is the non payment of the residue of the money.

Judgment for Plaintiff.

M'INTYRE *v.* SEWERS.

(*Coram Alderson, B., sitting alone.*)

Where a cause was set down for trial at the sittings in Easter Term, and by consent made a remanet to the sittings after Trinity Term, when the plaintiff withdrew the record;

THIS was a motion for a rule for judgment as in case of a nonsuit. The cause, which was a town cause, had been set down for trial at the sittings after Easter Term, 1844, when it was by consent made a remanet to the sittings after Trinity Term. At those sittings the plaintiff withdrew the record; it was held that the defendant might move for judgment as in case of a nonsuit.

Butt shewed cause. There has been no default to entitle the defendant to move. When a plaintiff has once complied with the practice of the Court by taking the cause down for trial, and it is made a remanet, the defendant is not in a condition to move for judgment as in case of a nonsuit; *Brown v. Rudd* (a). He also cited *Gilbert v. Kirkland* (b).

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Barstow, in support of the rule. This case is precisely similar to *Gadd v. Bennett* (c), which decided, that where a cause is set down for trial in Term, and made a remanet to the sittings after Term, by consent, the defendant may move for judgment as in case of a nonsuit, if the plaintiff afterwards withdraws the record. The Court there distinguished it from the case cited in which the causes had been made remanets at the assizes. The plaintiff is clearly in default by withdrawing the record; *Burton v. Harrison* (d).

ALDERSON, B.—I find, upon inquiry, that where a cause is made a remanet, no fresh notice of trial is necessary. We must, however, be governed by the case of *Gadd v. Bennett*, and, consequently, the rule will be discharged on a peremptory undertaking.

Rule accordingly.

(a) 1 Dowl. 371.

(b) Ibid. 153.

(c) 2 B. & A. 709.

(d) 1 East, 346.



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TURNER v. MASON.

Assumpsit: by a domestic servant for discharging her without a month's notice or a month's wages. **Plea,** that the plaintiff requested the defendant to give her leave to absent herself from his dwelling-house during the night; that the defendant refused such leave, and the plaintiff, against his will, absented herself. **Replication,** that the mother of the plaintiff was seized with sudden and violent sickness, and believing herself in imminent peril of death, had requested the plaintiff to visit her; whereupon the plaintiff requested the defendant to allow her to absent herself from his dwelling-house until the following day, for the purpose of enabling her to visit her mother in her said sickness; and because

ASSUMPSIT. The declaration in substance stated, that in consideration that the plaintiff, at the request of the defendant, would become the servant of the defendant, to wit, in the capacity of housemaid, for certain wages, to wit, the wages of 7*l.* for the year, the defendant promised the plaintiff to employ her in the capacity and for the wages aforesaid, and to continue her in such service until the expiration of a month after notice or warning given by the plaintiff or defendant to the other of them, to put an end to such service: and in case the defendant should put an end to such service without such notice or warning, he should pay to the plaintiff the wages for a month. It then alleged that the plaintiff became the servant of the defendant, and although she was ready and willing to continue in such service; yet the defendant discharged her without notice or warning.

Plea: that before the defendant discharged the plaintiff from his service, to wit, on, &c., the plaintiff requested the defendant to give her leave to absent herself from his dwelling-house, and from his said service and employ, during the then ensuing night, and until the following day; and thereupon the defendant then refused the said plaintiff such leave as aforesaid, and forbad her from so absenting herself from his said dwelling-house, or from his said service or employ; and the said plaintiff then, without the leave and against the will of the defendant, and disregarding her having been so forbidden as aforesaid, left the said defendant's dwelling-house, and his said service and employ, and absented herself therefrom from the day and year last aforesaid, during the following night, and until

the defendant, without any reasonable cause, refused such assent, the plaintiff, for the purpose of visiting her mother, left the dwelling-house of the defendant, as in the plea mentioned: *Held*, on special demurrer, that the plea was good, and the replication bad.

the following day: wherefore the defendant did then discharge the plaintiff from his said service and employ. Verification.

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Replication: that just before the said time when the plaintiff so requested the defendant to give her leave to absent herself from his dwelling-house, and from his said service and employ, to wit, on, &c., one Hannah Turner, the mother of the plaintiff, had been seized with sudden and violent sickness, and was then in imminent peril of death; and by reason thereof the said H. Turner, believing herself likely to die, and being anxious to see the plaintiff before her death, had then requested the plaintiff to visit her: whereupon the plaintiff, at the said time, when, &c., requested the defendant to give her leave to absent herself from his said dwelling-house, and from his said service and employ, during the then ensuing night, and until the following day (the same being a reasonable time in that behalf) for the purpose of enabling the plaintiff to visit her said mother in her said sickness, and to see her before her death; she the plaintiff not being thereby likely to cause any injury or hindrance to the defendant in his domestic affairs and business, nor intending to be thereby guilty of any improper omission, or of any unreasonable delay of her duties as such servant: and because the defendant then wrongfully, and without any reasonable cause in that behalf, refused the plaintiff such leave as aforesaid, and wrongfully and unjustly forbade her from so absenting herself from his said dwelling-house, and from his said service and employ; she the plaintiff, for the purpose of visiting her said mother in her said sickness, and seeing her before her death, at the said time when, &c., left the defendant's said dwelling-house, and his said service and employ, and absented herself therefrom from the day and year in the said plea mentioned during the following night, and until the following day, as in the said plea mentioned, the same being a reasonable time in that behalf, and for no other or longer period, and for no other or different

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purpose; she the said plaintiff not thereby causing any injury or hindrance to the defendant in his said domestic affairs or business, nor being thereby guilty of any improper omission or unreasonable delay of her duties as such servant of the said defendant as aforesaid; as she lawfully might, for the cause aforesaid. Verification.

Special demurrer, assigning for cause that the replication was a departure from the declaration, which alleges that the plaintiff was always ready and willing to continue in the service of the defendant until a month after notice or warning: also, that the replication admits a breach of contract, which justified the defendant in discharging the plaintiff.

Gray, in support of the demurrer, was stopped by the Court, who intimated that the only question was whether the plea was good. They called on

Badeley, who cited *Levison v. Risk* (a); *Callo v. Brouncker* (b); *Fillieul v. Armstrong* (c); *Jacquot v. Bourra* (d).

POLLOCK, C. B.—I am of opinion that the plea is good. It discloses a lawful order from a master to his servant that she should not absent herself from his house during the night: it then avers, that without his permission and against his bidding, she went away and left his service. It is clear, that under the circumstances she had no right to leave. The replication states the illness of the plaintiff's mother, but there is no averment that the defendant had any notice of that, or was at all acquainted with the fact; nor does the replication state that there was any necessity for the plaintiff visiting her mother, or that any advantage would thereby accrue to the mother, or that she

(a) *Lane*, 65.

& P. 406.

(b) 4 C. & P. 518.

(d) 7 Dowl. 348.

(c) 7 A. & E. 557; See S. C. 2 N.

was in such a state that the service of her daughter would be of any use to her. It is questionable whether any service to be rendered to another person would justify a servant in quitting the service of her master. Whether, if the replication had gone on to shew that her attendance on her mother was absolutely necessary, and that the master had notice of that fact, it would have been good, we are not called upon to decide; for this replication does not shew that the plaintiff was desirous of going to her mother, in order to render her any benefit or advantage, or that the defendant had any notice of the mother's illness.

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PARKE, B.—The contract in the case of a domestic servant is to serve for a year, the service to be determined by a month's warning or by payment of a month's wages, subject to the implied condition that the servant will obey the lawful orders of her master. It was ruled by Lord *Ellenborough*, in *Spain v. Arnott* (a), that if a servant refuse to obey his master's orders, the latter is justified in dismissing him. That doctrine was confirmed in the case of *Amor v. Fearon* (b). It is, therefore, clear that there is a lawful cause of dismissal, if the servant wilfully disobey the orders of his master. The plea discloses the particulars of such disobedience, namely, that the plaintiff required to go out for a night, that the defendant refused permission, and that the plaintiff went against his consent. That is ample cause for putting an end to the contract, unless the replication discloses sufficient ground for disobedience of the master's orders. The question then is, does it do so? The master is the proper person to regulate the conduct of his servant, and the times of her going out and coming in; and, therefore, it appears to me, that the replication does not disclose sufficient ground for disobeying his orders. Even supposing it had been communicated to the plaintiff that her mother was in a state of extreme danger, and the

(a) 2 Stark. N. P. C. 256. (b) 9 A. & E. 548; See S. C. 1 P. & D. 398.

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defendant had been so unkind as to refuse his permission to visit her, still that does not appear to me to justify the servant's disobedience of his orders. Besides, the replication does not state that the defendant had any notice of the illness of the plaintiff's mother.

ALDERSON, B.—I am of the same opinion. The plea is good, because it states that the master discharged his servant for wilful disobedience of his order to stay at home all night, and that she chose to absent herself. The replication in the first place is informally pleaded: it contains no averment that the plaintiff's mother was about to die, or that it was necessary for her daughter to visit her on that particular night, or to stay all night; and, supposing it did, it would only shew a moral obligation on the part of the defendant, which has nothing to do with the question whether or no the servant has a legal right to be absent. Perhaps it was a wrong thing of the master to refuse his permission; but we have to decide according to law, and if this replication were held good, it would be difficult to know where to stop—what degree of sickness or of danger, or what relationship or sex would justify a servant in disobeying his master's orders. It is very true that there are many cases in which a servant might be justified; for instance, in the case of an infectious fever, or if the servant was in danger of violence from her master, or if sickness rendered it necessary to consult a physician. But those are cases of absolute necessity, and form the exception, of which obedience is the rule.

ROLFE, B.—The cases mentioned by my Brother *Alderson* are perhaps only putting in another form what is in truth no disobedience; for it is an unlawful order to tell a servant to stay at home when she is in danger of violence to her person, or from infectious disease.

Judgment for Defendant.

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ASTON v. BREVITT.

TROVER. The declaration contained three counts in the usual form. The first count alleged a conversion of twenty tons of hay; the second a conversion of one hundred bushels of barley, and twenty tons of straw; the third a conversion of five hundred bushels of turnips.

The defendant pleaded, thirdly, to the whole declaration: That before and at the said several times, when, &c., one William Brevitt was lawfully possessed, as of his own property, of and in three equal undivided fourth parts or shares, (the whole into four equal parts or shares to be divided,) of and in the several goods and chattels in the declaration mentioned: that before any of the said times, when, &c., to wit, on, &c., the said William Brevitt, then being possessed thereof, in manner aforesaid, delivered the said goods and chattels to one Richard Roe, to be by him kept to and for the use of him the said William Brevitt; and that the said Richard Roe, before any of the said times, when, &c., to wit, on, &c., delivered the said goods and chattels to the plaintiff: whereupon the defendant, at the said several times, when, &c., as the servant of the said William Brevitt, and by his command, seized and took the said goods and chattels out of the possession of the plaintiff, and carried away the same, as the defendant lawfully might, for the cause in this plea aforesaid: *quæ sunt eadem*, &c. Verification.

Replication to the third plea, as far as the same relates to divers, to wit, seven tons weight of the hay, and divers, to wit, thirty bushels of barley, and seven tons weight of the straw, and divers, to wit, two hundred bushels of the

To trover for twenty tons of hay, &c., the defendant pleaded that one B. was possessed of three undivided fourth parts in the said goods, and being so possessed, delivered the same to R., to be by him kept for B.: that R. delivered the goods to the plaintiff; whereupon the defendant, as servant of B., and by his command, seized and took the said goods.

Replication, so far as the plea relates to seven tons of hay, &c., portion of the goods in the declaration mentioned, the plaintiff, admitting that the defendant, as the servant of B., converted the *said last mentioned goods* as in the plea alleged; yet saith that B. was not possessed of three undivided fourth parts in the

said last mentioned goods, modo et formâ, &c.

Replication, so far as the plea relates to seven tons of hay, &c., other *portion of the goods in the declaration mentioned*, the plaintiff, admitting that B. was possessed of three undivided fourth parts in the goods and chattels last aforesaid; yet saith that defendant, of his own wrong, &c., converted the *said last mentioned goods*. On special demurrer to the replications: *Held*, first, that the plea was good: secondly, that the replications were bad, inasmuch as the words "last mentioned goods" referred to all the goods in the declaration.

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turnips, portion of the goods and chattels in the declaration mentioned, the plaintiff saith, that admitting that the said defendant, as the servant of the said William Brevitt, and by his command, converted and disposed of the said last mentioned goods and chattels in manner and form as in the said plea is alleged; yet the plaintiff saith, that the said William Brevitt was not lawfully possessed as of his own property, of and in three equal undivided fourth parts or shares, (the whole into four equal parts or shares to be divided) of and in the said last mentioned goods and chattels, modo et formâ, &c., concluding to the country.

And as to the said plea, so far as the same relates to divers, to wit, seven tons weight of the hay, and divers, to wit, thirty bushels of the barley, and seven tons weight of the straw, and divers, to wit, two hundred bushels of the turnips, other portion of the goods and chattels in the declaration mentioned, the plaintiff says, that admitting that the said William Brevitt was lawfully possessed as of his own property, of and in three equal undivided fourth parts or shares, (the whole into four equal parts or shares to be divided) of and in the several goods and chattels last aforesaid; yet the plaintiff saith that the defendant, of his own wrong, &c., without the defendant being servant of the said William Brevitt, and by his command as in the said plea mentioned, converted and disposed of the said last mentioned goods and chattels in manner and form as in the declaration mentioned. And this the plaintiff prays may be inquired of by the country.

Special demurrer to the former replication to the third plea, so far as the same relates to seven tons weight of the hay, thirty bushels of the barley, seven tons weight of the straw, and two hundred bushels of turnips: that the replication is addressed and pleaded only to a part of the goods and chattels in the declaration; but that the issue tendered by the said replication is not confined, as it ought to have been, to the said part of the said goods and chattels, but extends to and includes

all the goods and chattels in the declaration. That the traverse taken to the said replication is too large, and improperly puts the defendant not only to prove the title and property of the said William Brevitt, in and to the part of the goods and chattels to which the said replication is addressed and pleaded; but also to prove his title and property in and to the residue of the goods and chattels in the declaration mentioned. That the said replication and traverse therein contained are ambiguous and uncertain; inasmuch as it is at the best doubtful and uncertain whether in and by the words "the said last mentioned goods and chattels," as those words are used in the said replication and traverse, all the goods and chattels in the declaration mentioned, or only a portion of them, are meant.

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There was a demurrer to the other replication in nearly similar terms.

Unthank, in support of the demurrers. In both replications the words "last mentioned goods and chattels," refer to "the goods and chattels in the declaration mentioned;" so that though the plea professes to justify the conversion of a part of the goods only, the issues raised by each replication would compel the defendant to shew his right to the whole. At all events, the replications are ambiguous; and *Brancher v. Molyneux* (a) shews that the objection may be taken by special demurrer. [*Parke*, B.—The question is, whether your plea is good?] The plea admits a conversion of the goods, and justifies it under the command of a joint tenant. *Morant v. Sign* (b) is an express authority to shew that the plea is good.

Hugh Hill, *contra*. The plea does not sufficiently confess and avoid any conversion of the goods. This case is not distinguishable from *Ascue v. Sanderson* (c); where, to

(a) 1 M. & G. 710; See S. C. 5 Dowl. 319.

1 Scott's N. R. 553.

(c) Cro. Eliz. 433.

(b) 2 M. & W. 95; See S. C.

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trover for sheep, the defendant, as sheriff, justified the taking under a writ of fieri facias, and the Court held the plea bad, principally because it did not confess any conversion. The seizure by one tenant in common would not of itself amount to a conversion, and it is consistent with this plea that the plaintiff was the other tenant in common. *Whitmore v. Greene* (a) shews that unless a seizure amounts to a conversion, it need not be justified. If, on the other hand, the plea must be taken as confessing a conversion, it does not afford any justification; because it admits any description of conversion which may be given in evidence under the declaration, but it only justifies a conversion by seizure. That objection is not removed by the *quæ est eadem*, &c., which is mere form. [*Parke, B.—Morant v. Sign* (b) is exactly this case.]

POLLOCK, C. B.—I am of opinion that the plea is good, and the replications bad. As to the latter, I have no doubt what the plaintiff's meaning was, but when they are examined with technical nicety, there is certainly an ambiguity. The words "last mentioned goods and chattels," may mean all the goods and chattels in the declaration. As the objection is pointed out by special demurrer, we must hold it good.

PARKE, B.—I am of the same opinion. There is no doubt what the pleader meant; but he has expressed himself in such a way as to lead to the defect which is pointed out on special demurrer. If the defendant had joined issue, this form of replication would have given the plaintiff great advantage. With regard to the plea, it is good on the authority of *Morant v. Sign* (b).

ALDERSON, B.—It appears to me also that the plea is good, and that the replications are bad on special demurrer.

(a) 13 M. & W. 104; See S. C. ante, p. 174.

(b) 2 M. & W. 95; See S. C. 5 Dowl. 319.

If the objection had been passed over, there is no doubt that at nisi prius the contest would have been whether or not the plaintiff was entitled to have the larger issue proved.

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Judgment for Defendant.

JONES v. CHAPMAN and Others.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and removing therefrom his goods and chattels, &c.

Plea, by defendants J. Williams, R. Price, and J. Jones, that before the committing of the said trespasses, and after the passing of a certain act of Parliament, made and passed in the second year of the reign of her present Majesty, entitled "An Act to facilitate the Recovery of Possession of Tenements, after due determination of the Tenancy," to wit, on, &c., the defendant Henry Chapman, then being the agent of one Harriett Middleton, and, as such agent, made his complaint in writing before her Majesty's justices of the peace acting for the district of Rutlun, in the county of Denbigh, (being the district wherein the said dwelling-house, tenement, and premises, hereinafter next mentioned, were and are situate) and then in petty session assembled, to the number of two and more; and thereby said that the said H. Middleton, by her agent George Adams, Esq., did let to the plaintiff a tenement, consisting of a messuage called Blyn y Ffyunon, being the said dwelling-house in the said count mentioned, and in which, &c., with the

To trespass for breaking and entering the plaintiff's dwelling-house, and removing his goods; the defendants pleaded, that after the 1 & 2 Vict. c. 74, C., as agent of M., made his complaint in writing before justices acting for the district of R. wherein the premises thereafter mentioned were situate, and stated, that M. let to the plaintiff a tenement from year to year, under the rent of 4s., that the tenancy was determined by notice to quit, and that C., as such agent, served on the plaintiff a

notice of his intention to recover possession of the said tenement, a duplicate of which notice was served on the wife of the plaintiff on the premises, and read over and explained to her. The plea then set out the notice, and alleged that the justices duly issued their warrant, directed to the defendants and all other constables and peace officers acting for the several parishes within the hundred of R., and thereby authorized and commanded the defendants, and said other constables and peace officers, to enter on the said tenement, and deliver possession thereof to C. as such agent. The plea then proceeded to justify the breaking and entering the premises, and removing the goods by virtue of the said warrant: *Held*, that the plea was bad, and that the defendants who acted in obedience to the warrant were not protected by the 24 Geo. 2, c. 44.

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appurtenances, situate in the township of Aberchurlar, in that part of the parish of Bodfary, which was in the said county of Denbigh, for a term of one year, and so from year to year, under the rent of four shillings; and that the said tenancy was determined by notice to quit, given by the defendant Chapman, as agent to and on behalf of the said H. Middleton, owner of the said tenement, on the 30th day of November then last past; and that, on the 28th day of January, then last past, the defendant Chapman, as agent for and on behalf of the said H. Middleton, did serve on the plaintiff a notice in writing of his intention to apply to recover possession of the said tenement, a duplicate of which notice was thereto annexed, by giving by the hands of John Jones, of, &c., bailiff, employed by him the defendant Chapman, agent as aforesaid, for that purpose, a true copy of the last mentioned notice, thereto annexed as aforesaid, to the wife of the plaintiff, that is to say, by leaving the same with the said wife of the plaintiff, being in and apparently residing at the place of abode of the plaintiff, so holding on the said tenements as aforesaid, that is to say, at the said messuage or tenement, called Blyn y Ffyunon; and that the said J. Jones did read over the said notice thereto annexed to the said wife of the plaintiff, so served as aforesaid, and with whom the same notice thereunto annexed was left as aforesaid; and explained to the said wife of the said plaintiff the purport and intention thereof; that notwithstanding the said notice, the plaintiff did refuse to deliver up possession of the said tenement, and then still detained the same, unto which said complaint, a duplicate of the said notice of intention to make the said application was then annexed, and was and is as follows, (the plea then set out the notice, which was according to the form given in the schedule of the 1 & 2 Vict. c. 74): which said notice was signed, Charles Henry Chapman (meaning the defendant Chapman), agent to H. Middleton, owner of the said tenement, and was addressed to Mr. Robert Jones, Blyn y Ffyunon, Aberchurlar,

Bodfary, meaning the said plaintiff; and the defendants J. Williams, R. Price, and J. Jones, further say, that the said complaint having been so made, and proof having, to wit, then been given to the said justices, at petty sessions assembled, as aforesaid, by the defendant Chapman, as agent of the said H. Middleton, as aforesaid, of the holding and due determination of the said tenancy of the plaintiff, with the time and manner thereof, the said justices so assembled in the petty sessions aforesaid, that is to say, the Rev. Edward Thelwall, clerk, and Thomas Downword, Esq., then being two of the said justices acting for the said district in which the said tenement was situate, then, to wit, on, &c., duly issued their warrant, under their hands and seals, directed to the defendant, J. Williams, to J. Jones, and all other constables and peace officers acting for the several parishes within the hundred of Rutlun, in the said county; and thereby, after reciting the said complaint of the said defendant Chapman, and that the said matters alleged therein were fully proved before them, the said justices, upon the oaths of credible witnesses; the said justices did authorize and command the said J. Williams and J. Jones, and the said other constables and peace officers, or any of them, on any day, being not less than twenty-one, nor more than thirty clear days from the date thereof, between the hours of nine in the forenoon, and four in the afternoon, to enter, by force, if needful, and with or without the aid of the defendant Chapman, as such agent as aforesaid, or any other person or persons whom they might think requisite to call to their assistance, into and upon the said tenement and premises to enter, and to eject thereout any person, and of the said tenement and premises, full and peaceable possession to deliver to the defendant Chapman, as such agent as aforesaid: and the defendants J. Williams, R. Price, and J. Jones, say, that the said warrant being so made and issued, the said defendant J. Williams, under and by virtue thereof, at the said time when, &c., being a day not less

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than twenty-one nor more than thirty clear days from the said 6th day of February, A. D., 1843, the date of the said warrant, and between the hours of nine in the forenoon and four in the afternoon of the same day, broke and entered the said dwelling, in which, &c., in the said count mentioned, being part of the said tenement in the said warrant mentioned, in order to deliver possession of the same to the said defendant, Chapman, as such agent as aforesaid; and it being then necessary for the defendant J. Williams, in order to execute the said warrant, to call other persons to his assistance in the execution thereof; the said defendants R. Price and J. Jones, being then so called to the aid of the defendant J. Williams, and by him then required to assist him in the execution of the said warrant; thereupon they, at the said time, when, &c., also broke and entered the said dwelling-house, in which, &c., with the defendant, J. Williams, and in his aid and assistance, in and about the execution of the said warrant; and because the plaintiff then resisted the execution of the said warrant, and it was then needful to use force for executing the same, the said defendants, J. Williams, R. Price, and J. Jones, on the occasion and for the purpose aforesaid, committed the said trespasses, other than the seizing, taking, removing, and carrying away the said goods and chattels: and as to the taking, seizing, removing, and carrying away the said goods and chattels, the defendants, J. Williams, R. Price, and J. Jones, say, that after the said plaintiff was so expelled and removed from the said dwelling-house, in which, &c., they, the defendants, seized and took the said goods and chattels, then being in the said dwelling-house, and removed and carried them away out of the said dwelling-house, in which, &c., to a small and convenient distance, and there left them for the use of the plaintiff, doing no unnecessary damage thereto, as for the cause aforesaid they lawfully might: *quæ sunt eadem*, &c. Verification.

Special demurrer, assigning for causes, that it is not alleged in, nor does it appear from, the said plea, that the defendant, J. Williams, or any of the said other defendants,

was, at the time of the granting and issuing of the said warrant therein mentioned, nor at the said time, when, &c., a constable or peace officer, or one of the constables or peace officers of the district, division, or place within which the said dwelling-house, tenements, and premises, in that plea mentioned, or any of them, or any part thereof, were, or was situate; also that it does not appear in or from the said plea that the said justices therein mentioned, had any jurisdiction to grant or issue the said warrant therein mentioned; and that it is not positively alleged, nor does it sufficiently appear, in or from the said plea, that the plaintiff ever was tenant of the said premises, or any of them, or any part thereof, to the said H. Middleton; or that the said supposed tenancy was or is determined; or that the plaintiff was ever served with such notice as is by the said act of Parliament required in that behalf; or that he refused or neglected to quit or deliver up possession of the said premises, or any of them, or any part thereof; or that any proof was given to the justices before or at the time of the granting or issuing of the said warrant in the said plea mentioned, or at any time whatever, of the service of such notice as aforesaid, or of the neglect or refusal of the plaintiff as aforesaid.

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Welsby, in support of the demurrer. The plea is clearly bad on the grounds assigned. Where a party seeks to justify a trespass under the authority of a justice's warrant, the plea must state, by distinct averment, every fact necessary to give the justice jurisdiction. The present plea professes to be founded on the 1 & 2 Vict. c. 74, which provides a summary mode of recovering possession of certain premises, after the determination of a tenancy. By the first section of that statute (a), before the justices

(a) Section 1 enacts, "that any house, land, or other corporeal hereditaments held by from and after the passing of this act, when and so soon as the him at will or for any term not term or interest of the tenant of exceeding seven years, either

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are authorised to act, it is necessary that a notice, in the form prescribed should be given to the party in possession,

without being liable to the payment of any rent or at a rent not exceeding the rate of twenty pounds a-year, and upon which no fine shall have been reserved or made payable, shall have ended or shall have been duly determined by a legal notice to quit or otherwise, and such tenant or (if such tenant do not actually occupy the premises, or only occupy a part thereof,) any person by whom the same or any part thereof shall be then actually occupied shall neglect or refuse to quit and deliver up possession of the premises or of such part thereof respectively, it shall be lawful for the landlord of the said premises or his agent to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner herein-after mentioned) with a written notice, in the form set forth in the schedule to this act, signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices herein-after mentioned reasonable cause why possession should not be given under the provisions of this act, and shall still neglect or refuse to deliver up possession of the premises or of such part thereof of which he is then in possession to the said landlord

or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession, and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division, or place within which the said premises or any part thereof shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals, to the constables and peace officers of the district, division, or place within which the said premises, or any part thereof shall be situate, commanding them, within a period to be therein named, not less than twenty-one nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent: provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas day, or at any time except between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person on whose application and to whom

and he must have failed to appear at the time and place appointed; or, if he appeared, must have failed to shew to the satisfaction of the justices, reasonable cause why possession should not be given. Then upon proof of the determination of the tenancy, and of service of the notice, and of the neglect or refusal of the tenant, the justices are authorised to issue a warrant to the constable of the district, division, or place within which the premises are situate. This plea does not allege, by way of distinct averment, either that the plaintiff was tenant, or that the tenancy was determined; but it only mentions those facts as part of the complaint. Neither is it alleged that proof was given before the justices of the service of the notice, or of the neglect or refusal of the plaintiff to give up possession; or that the plaintiff did not appear; or that though he appeared, he did not shew sufficient cause why the warrant should not issue. Besides, it is not stated that the hundred of Rutlun is the district, division, or place within which the premises are situate. The defendants will, perhaps, rely on the fifth section of the 1 & 2 Vict. c. 74, which enacts, "that it shall not be lawful to bring any action or prosecution against the said justices by whom such warrant as aforesaid shall have been issued, or against any constable or peace officer by whom such warrant may be executed, for issuing such warrant or executing the same respectively, by reason that the person on whose application the same shall be granted had not lawful right to the possession of the premises." That section, however, only gives protection where the proceedings have been in accordance with the

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any such warrant shall be granted from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not at the time of granting the same lawful right to the

possession of the same premises: provided also, that nothing herein contained shall affect any rights to which any person may be entitled as out going tenant by the custom of the country or otherwise.

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statute, and it afterwards turns out that the person on whose application the warrant has issued had no lawful right to possession. The question then, is, whether this plea can be considered a sufficient justification at common law; and it is submitted that it cannot. On that subject the observations of *Tindal*, C. J., in *Morrell v. Martin* (a), are in point. The Court called on

Peacock to support the plea. This is not an action against the justices, but against the constable and others who acted under their warrant. The defendants are, therefore, protected, under the 24 Geo. 2, c. 44. [*Parke*, B.—That act does not apply to a case like this, where the statute gives a special authority to a constable of the district]. The object of the 24 Geo. 2, was to protect persons who acted in obedience to a justice's warrant. [*Parke*, B.—By the terms of the act of Parliament, no officer can be justified in executing the warrant, except the constable of the district, division, or place, within which the premises are situated. The question does not turn on the 24 Geo. 2, for it is not shewn that the party executing the warrant was a constable of the district. The defendants must make out that they were entitled to take possession under the 1 & 2 Vict. c. 74, and they have failed to do so.]

Judgment for the Plaintiff.

(a) 3 M. & G. 590; See S. C. 4 Scott's N. R. 300.

COURT OF QUEEN'S BENCH.

Easter Term.

IN THE EIGHTH YEAR OF THE REIGN OF VICTORIA.

In re GEDYE,
and in a cause between
GEDYE and ELGIE.

THIS was an application by the defendant, a country attorney, to tax the bill of the plaintiff, his London agent, for the recovery of which the present action had been brought.

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A bill for
agency busi-
ness is not
taxable under
the 6 & 7 Vict.
c. 73.

A rule nisi having been obtained to refer the bill for taxation, and in the meantime to stay all proceedings in the action;

Gray and Collier shewed cause. This is an application under the 6 & 7 Vict. c. 73, s. 37; but it is submitted, that that statute applies only to transactions between a solicitor and his client. Before that statute, the act which authorized the Court to refer a bill for taxation was the 2 Geo. 2, c. 23, s. 23. It may perhaps be said that this statute would have applied to agents' bills; but for the subsequent enactment in the 12 Geo. 2, c. 13, s. 6, which expressly excludes agency bills from its operation. It is clear, however, from the wording of the enactments of the 2 Geo. 2, c. 23, that they had reference only to bills

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between attorneys and their clients, and not between one attorney and another; for the 23rd section requires the bill to be "written in a common legible hand, and in the English tongue,"—"and in words at length," &c. Besides, the practice of appointing an agent in town appears to have been introduced in the reign of George the First, *Lush's Pract.* p. 293; and had the act been intended to apply to such agents, they would, no doubt, have been expressly named in it. The exceptive enactment in the 12 Geo. 2, c. 13, s. 6, may therefore have proceeded from an extreme caution. With respect to the recent statute, which amends and consolidates the law relating to attorneys, it is not to be supposed but that the word "agent" would have been used, if intended to have been included in the 37th section. A recent decision in this Court, *In re Simons (a)*, shews that to bring the case within the above section, the party must have acted "as solicitor or attorney." Now, a London agent acts not "as solicitor or attorney," but "as agent;" and, as such, has a totally different scale of remuneration and charges. The rights also of an agent as against the attorney differ from those of an attorney against his client. An agent has only a lien on the papers or money of the client for his bill of charges in that particular suit; whereas the attorney has a general lien on all the papers of his client.

Lush, in support of the rule. It is true that in the case of *Cardale v. Bull (b)* it was decided that a common law agent's bill is not taxable under the 2 Geo. 2, c. 23, and the 12 Geo. 2, c. 13. But the case of *Jones v. Roberts (c)*, which is there referred to, shews that in equity a different construction prevails. [*Coleridge, J.*—The Courts of Equity seem to claim the right, independently of any power conferred by statute.] If the attorney is not entitled to have his agent's bill taxed, he is not entitled to have it delivered. There is no reason

(a) *Ante*, p. 500.

(c) 8 Sim. 197.

(b) 4 Q. B. 611.

why the items of an agent's bill are more fit to be discussed before a jury than those of an attorney's. As to the objection that the charges are on a different scale, the Masters would, of course, adapt their rates of allowance accordingly. There being then no reason why an agent's bill should not be taxable, it remains to be seen whether it is included in the recent statute, either by express words, or by any sufficiently comprehensive enactment. The recent act applies to all bills of an attorney. Formerly, in order to have the bill taxed, the business must have been in a Court of law or equity; now the intention of the statute is, that all bills may be taxed, and the words of the enactment are sufficiently comprehensive. Sect. 32, shews that the relation of attorney and agent was present to the mind of the Legislature when framing the act. Besides, the recent act repeals the 12 Geo. 2, c. 13, s. 6, which prevented the 2 Geo. 2, c. 23, from applying to agents' bills; and, as the words of the present act are equally comprehensive with the old, and no exceptive clause is to be found, it is submitted that an agency bill is within the enactments of the recent statute.

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COLERIDGE, J.—Upon consideration of this case, I am of opinion that the recent act, the 6 & 7 Vict. c. 73, does not apply to agents' bills; and that this rule must, consequently, be discharged. I entirely agree with what has been said respecting the necessity of construing that act with reference to the state of the law at the time when it was passed; and I am satisfied that its provisions were well weighed, and made with great care.

Now, it is said, that in the Court of Chancery agents' bills were taxable by virtue of the inherent power of the Court, without reference to any legislative enactment. With regard, therefore, to such bills, it was not necessary to introduce any special provision in the recent act. The Courts of Common Law, on the other hand, held that they possessed no power independent of the statute, to order the taxation of an attorney's bill. And with respect

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to agency bills, it was equally clear that the express provisions of the 12 Geo. 2, c. 13, prevented the common law Courts from having any power over them. It was contended, however, that the statute 2 Geo. 2, c. 23, included agents' bills; but I do not think it very material in the view I take of the present case, to consider whether it did or not.

In order then to judge whether any alteration were intended in the law with respect to agents' bills, let us see what was done in other matters where an alteration was effected. Now, in the case of executors and others chargeable on a bill, the act provides that the bill may be taxed on the application of the party interested in the property. So with respect to the subject-matter of the taxation; the Courts had no power to refer any other business than that done at law or equity: and the act expressly extends it to business not transacted in either a Court of law or equity.

If, therefore, we find that where alterations are made in other matters, the act expressly mentions them, and is silent as to any alteration with respect to agent's bills, I think the irresistible inference to be drawn from this silence is, that agents' bills were not intended to be included in the act. Am I then to say, that because general words are used in the act, therefore it was not necessary to introduce the word "agent?" This view might be entitled to some weight if I were dealing with the case of parties who might be supposed not to know the existing state of the law. But the whole force of the argument of Mr. *Lush* has been directed to shew that an agent was a party well known at the time of the passing of the act.

It must therefore, I think, be taken, that an agent's bill is not included in the act, and is consequently left in the same state as before the act was passed; that is, as it was untaxable before, so also is it untaxable since the passing of the act.

Rule discharged.

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In re HILLIARD.

A RULE had been obtained in last Term, calling upon an attorney of the name of Hilliard to shew cause why he should not pay a sum of 29*l*., in pursuance of his undertaking. It appeared that Hilliard had acted as attorney for the defendant in a cause of *Wennington v. Forrester*; and that on notice of trial being given the defendant consented to execute a cognovit, which Hilliard attested as his attorney. It was asserted in the affidavits in support of the rule, and not contradicted, that Hilliard was aware, at the time of the execution of the cognovit, that the attestation was invalid for not following the form required by the 1 & 2 Vict. c. 110, s. 9. The plaintiff afterwards discovering that the attestation had been informal, obtained a Judge's order to set aside the cognovit and execution which had issued, without costs; which being done, he proceeded in the action. Negotiations were then entered into; by which the plaintiff agreed to stay proceedings, on Hilliard's giving a personal undertaking; which he did in the following form:

Where the attorney of the defendant had given an undertaking to pay the debt, in consequence of which the plaintiff stayed proceedings; the Court enforced the undertaking; although it was void under the 4th section of the Statute of Frauds.

I agree to pay to Mr. Samuel Smith within one calendar month from this day, the sum of twenty-nine pounds. Witness my hand, this thirtieth day of October, 1844.

J. H. HILLIARD.

The money having been demanded and not paid, the present rule had been obtained.

Martin now shewed cause. This is a promise to pay the debt of a third party, and is, therefore, void under the 4th section of the Statute of Frauds. The meaning of that section is not that a contract, coming within its terms, shall stand for all purposes, except that of being enforced by action; but that the contract shall be altogether void; *Carrington*

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 {
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v. *Roots* (a). The Court will not, it is presumed, exercise a summary jurisdiction, to enforce a contract, which is void in law. There is a case of *In re Greaves* (b), it is true, in which the Court of Common Pleas decided the contrary; but that case is not to be found in the regular reports of that Court, and is cited only in a note to the case of *Evans v. Duncombe* (c). The latter case, and the subsequent one of *In re Paterson* (d) were decided on its authority, and the question was not argued.

Gray, in support of the rule. The Court may force an attorney in this way to do justice, independent of any binding contract in law. The case of *In re Greaves* (b) is precisely in point, and has been acted on in the two subsequent decisions which have been cited.

It was also acted on in the case of *In re Hayward* (e) in this Court.

Cur. ado. vult.

COLERIDGE, J.—This was a rule to enforce the performance by an attorney of an undertaking to pay the sum of 29*l.* for his client; and the ground taken on the argument was that the contract was void by the 4th section of the Statute of Frauds, for want of a consideration appearing on the face of it. It was admitted, that in the case of *In re Greaves* (b), the same objection was made and overruled by the Court; and that in two other cases, rules had been granted on the authority of that case, with some remark on it by the learned Judges, and made absolute without cause shewn. And I have since been furnished with a case, not I believe reported, in which my brother Williams acted upon it in this Court, in Hilary Term, 1841.—*In re Hayward*.

Against this authority none was cited, and the argument used was founded entirely on considerations of contract. It seems to me that the Court does not interfere merely with

(a) 2 M. & W. 248.

(b) 1 Cr. & J. 374, n.

(c) 1 Cr. & J. 372.

(d) 1 Dowl. 463.

(e) H. T. 1841, not reported.

a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers. The Court acts on the same principle, whether the undertaking be to appear, to accept declaration, or other proceedings in the course of the cause, or to pay the debt and costs. It does not interfere so much as between party and party to settle disputed rights; as criminally to punish by attachment, misconduct, or disobedience in its officers. In this view, the objection relied on does not apply. I have no desire to narrow the jurisdiction of the Court as to these undertakings on any such ground as the present; they are very often most beneficially made for both parties in a cause, and there would be great injustice in letting the attorney loose from them, after the party has foregone the advantage or paid the price which was the consideration; while there is no hardship on the attorney in enforcing them; he is never compelled to enter into them; if he does, he should secure himself by his arrangement with his client, and he must be taken to know the legal consequences of his own act.

Rule absolute.

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NEWPORT v. HARDY.

THIS was an action of debt for use and occupation, to which the defendant had pleaded the general issue. At the trial, which took place at the Sheriff's Court in London, the plaintiff proved a *prima facie* case of rent due to the amount of 13*l.* 1*s.*, of which it was agreed that 2*l.* 14*s.* were due on the 27th May, 1844. The defence was, that one

In an action of debt for use and occupation, the defendant may shew, under the general issue, that J. S. had recovered a judgment in ejectment for

the premises, and that to avoid being turned out of possession, he had attorned and paid the rent subsequently accruing due to J. S.: but he cannot, with respect to the rent previously due, set up as a defence under this plea, that he has paid it to J. S.

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Joshua Clark had in 1837 recovered judgment in ejectment for the premises against the casual ejector; which judgment was revived by *scire facias* on the 8th of May, 1845. On the 27th of May, the defendant had notice of proceedings from Clark's solicitor, and was told that a writ of possession would be executed, and he would be turned out, unless he attorned and paid rent to him; whereupon accordingly paid the sum of 2*l.* 14*s.*, being the rent then deducting taxes, and had continued since that time to pay the rent to Clark. It was objected that this defence was not available under the plea of the general issue; but the learned commissioner directed the jury to find a verdict for the plaintiff, reserving to the defendant the liberty to move to enter a nonsuit, or to reduce the verdict to 2*l.* 14*s.*

Tomlinson, having obtained a rule nisi accordingly;

Humfrey shewed cause. If a recoverer in ejectment stand in the same light as the mortgagee of the premises cannot be denied that the case of *Waddilove v. Barne* is an authority to shew that as respects the rent accrued subsequent to the notice to the defendant, the defence is open under the general issue. But that case is also an authority expressly in point, that with respect to the rent which had previously accrued, the defence should not be specially pleaded. The plaintiff, therefore, is entitled at any rate, to the verdict for 2*l.* 14*s.*

Tomlinson, in support of the rule. A mortgagee is entitled to by-gone rents, as well as such as subsequently accrue due; *Pope v. Biggs* (b); and a recoverer in ejectment stands upon the same footing. [*Coleridge, J.*—*v. Biggs* is only an authority that a mortgagee can recover

(a) 2 Bing. N. C. 538; See (b) 9 B. & C. 245; See S. C. 2 Scott, 763; 4 Dowl. 347. 4 M. & R. 193.

by-gone rents that remain unpaid]. The present is even a stronger case than that of payment to a mortgagee; for here there could be no election. The case of *Hodgson v. Gascoigne* (a) shews that the recovery in ejectment relates back to the date of the demise as laid in the declaration, and that the relation between landlord and tenant ceases from that time.

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COLERIDGE, J.—(After stating the facts of the case as above). Upon the argument it was not, I think, seriously contended that the judgment with notice, and the bonâ fide threat of a writ of possession followed by an attornment thereon to the recoverer in the ejectment, were not equivalent to an eviction; so that the subsequent occupation was by *his* permission, and not by that of the plaintiff, the former landlord. And it was admitted, if that were so, that *Waddilove v. Barnett* (b) had decided that this might be given in evidence under *nunquam indebitatus*; and that the action was answered as to the subsequently accruing rent. But the same case was relied on, to shew that, with regard to the rent due before the notice, the defendant could only be discharged, if at all, by a special plea; for that *de facto* the previous occupation had been by permission of the original landlord, the plaintiff, and that its character was not altered by the subsequent notice and attornment.

And unless there be some distinction, material to the present purpose, between the relation of the mortgagor and his tenant before notice, and that of the recoverer in a judgment in ejectment and his tenant before notice, this argument will be just. For the defendant it was contended that there was such a distinction; and *Hodgson v. Gascoigne* (a) was relied on as shewing, that from the day of the demise in the ejectment the defendant was a mere

(a) 5 B. & A. 88.

(b) 2 Bing. N. C. 538; See S. C. 2 Scott, 763; 4 Dowl. 347.

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trespasser, and of course not liable to the payment of rent as an occupier under contract, or by payment of a year's rent. That case decided, that where the landlord is ejected for a forfeiture against his tenant, the tenant ceases from the day of the demise: the landlord treats the tenant as a trespasser from that day. The judgment shewed that he was so: consequently, the crops were his, not the tenant's, and he could not pay a year's rent, to be paid to him by the sheriff, under the statute of Anne, out of the goods seized under an execution at the suit of a third person, for that right was only in a landlord in the case of an existing tenancy. This is a sound decision, but it concludes nothing as between the tenant, and a person, the apparent owner, under whose name he has taken possession, and by whose permission he has occupied land. However infirm or merely defective the title of Newport, he, in fact, gave possession to Hardy, and Hardy has occupied by his permission. No consequences in law follow from the judgment affecting these facts; whether it be considered as a judgment against Newport, or against Hardy, it leaves the relation to each other untouched. Now these two modes of possession had from Newport, and occupation by permission, are all that are denied by the plea: the only mode of possession to pay is implied by law. If the defendant had pleaded that he should not pay in spite of the occupation by the plaintiff's permission, he should have pleaded that as a defence, and avoidance. *Waddilove v. Barnett* (a), seems to me to govern this case on both points. The judgment, therefore, will be absolute to reduce the damages to the value of the crops, and discharged as to the remainder.

Rule accor

(a) 2 Bing. N. C. 538; See S. C. 2 Scott, 763; 4 Dowl

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WAITE, Executor of GALE v. GALE.

THIS was an action of debt for money had and received, and on an account stated with the plaintiff as executor; to which the defendant had pleaded the general issue.

At the trial, which took place before the undersheriff of Wiltshire, it appeared that the plaintiff was the executor of one Elizabeth Gale, and that the defendant was one of the executors of her husband John Gale, and that the action was brought to recover the amount of certain interest due to her, in her lifetime, under the will of her husband. Notice had been given to produce the probate of the will of John Gale, which the defendant declined to do, but did not object that there was no proof that it was in his possession; whereupon the plaintiff produced an order of a learned Judge, (which was made by consent, and in the usual form), that the defendant should, at the trial of the cause, make the admissions specified in the following notice:

In an action for money had and received against an executor, but not naming him as such, the plaintiff proved a notice to produce the probate of the will; and also a notice to admit "an office copy of the last will and testament of John Gale, of Lockridge, in the parish of Overton, in the county of Wilts, brick-layer, proved at Marlborough, 19th April, 1813," and a Judge's order made for the admission in evidence of the document in question, which purported to be "extracted from the registry of the Archdeacon of Wilts," and to contain a copy of the will, and to be signed by "F. M., registrar," with an extract apparently from the Act Book, that the will had been proved and probate granted:

IN THE QUEEN'S BENCH.

Between George Waite, (executor of the last will and testament of Betty, otherwise Elizabeth Gale, deceased), Plaintiff, and George Gale, Defendant.

Take notice that the plaintiff in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant, his attorney, or agent, at my office, No. 26, Old Burlington-street, Bond-street, on Saturday, the eleventh day of May instant, between the hours of ten o'clock in the forenoon, and four o'clock in the afternoon of that day; and

Held, that the document was rightly admitted in evidence, without proof that the probate was in possession of the defendant, or of the signature of the registrar.

An action for money had and received will lie against an executor who receives the money of third parties, without declaring against him as executor.

Quere, if in an action against an executor, there is any legal presumption that the probate is in his possession.

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that the defendant will be required to admit that such of the documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies, are true copies, and such documents as are stated to have been served, sent or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated this 10th day of May, 1844.

Yours, &c.,

JOHN PIKE,
 26, Old Burlington-street,
 Plaintiff's Agent.

To Messrs. Dynely, Coverdale, and
 Lee, the above named Defendant's
 Agents.

Description of Document.	Date.	Original or Duplicate, served, sent or delivered, when, how, and by whom.
An office copy of the last will and testament of John Gale, of Lockridge, in the parish of Overton, in the county of Wilts, bricklayer, proved at Marlborough, 19th April, 1813.	2nd Feb. 1813.	Office copy.

The plaintiff then tendered in evidence a document, of which the following is a copy:

"Extracted from the registry of the Archdeacon of Wilts.

"In the name of God, Amen, I, John Gale, of," &c.
 [Here followed, apparently, a verbatim copy of the will, containing the following extract: "Also I give and bequeath unto my said wife Betty Gale, the interest of all the money I have now at use for and during her widow-

hood, and if she marry," &c., "or after her decease," then, &c.]

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"Taken from the original, } This will was proved at
and examined therewith, } Marlborough, on the 19th
Fitz. Macdonald (a), Re- } day of April, 1813, before
gistrar. } the Reverend Bartholomew

Buckerfield, Clerk, M. A., lawful surrogate of the Reverend and Worshipful the Archdeacon of the Archdeaconry of Wilts, and by him administration of all and singular the goods and chattels of the said deceased, and any ways concerning his will, was committed unto George Gale and John Gale the joint executors thereof, being first duly sworn of the truth of the said will, and faithfully to perform the same, and to pay the deceased's debts and legacies as far forth as his goods and chattels will thereto extend, and the law bind, and to exhibit a true and perfect inventory of the goods, chattels and credits of the deceased, and yield a just and true account when lawfully required, saving the rights of all persons.

"EDWARD DAVIES, Registrar" (b).

The defendant objected to the reception of this document in evidence, on the ground that this copy of the will was not evidence of the contents; but did not dispute that the document in question was the same office copy specified in the admission under the Judge's order. The undersheriff, however, admitted it in evidence; reserving leave to the defendant to move to enter a nonsuit. There was no proof that the signature was that of the registrar, or that the copy of the act of Court was correct. The plaintiff then proved that the defendant had received, in his character of executor, a sum of money belonging to the estate of John

(a) This signature, and the word "registrar" appended to it, were apparently original, and in a different handwriting from the rest of the document.

(b) This signature was in the same handwriting as the body of the document, and apparently not original.

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Gale, which was lying in the Marlborough bank. The defendant then objected that he should have been sued as executor; but the undersheriff overruled the objection, reserving leave, however, on that point also, to move to enter a nonsuit. The jury having found a verdict for the plaintiff for 3*l.* 3*s.*,

Whitehurst, in Hilary Term, obtained a rule to set aside the verdict, and to enter a nonsuit.

Butt now shewed cause. This rule has been moved on three grounds. With respect to one of these, namely, that an action will not lie for a legacy, it is sufficient to observe that the objection was not taken at the trial, and no leave has, therefore, been reserved; and the sum is under that for which the Court will direct a new trial. With respect to a second objection, namely, that the office copy of the will admitted in evidence was improperly received, it is submitted that the undersheriff was quite correct in his ruling. The office copy of the will is admitted under the Judge's order, to be the office copy of the will of John Gale; and, therefore, so far it is good secondary evidence of the contents of the will. Then as to the probate, the document attached is good secondary evidence of the probate having been granted, as against the defendant, who is one of the executors, and, therefore, as such, must be presumed to be in possession of the probate itself. [*Coleridge, J.*—The document at the foot of the copy of the will appears to be an extract copied from the Act Book itself. Should you not then produce the Act Book?] The Act Book is a public document, and as such a copy of it is admissible evidence. He cited *Gorton v. Dyson* (a), and *Doe dem Bassett v. Mew* (b). With respect to the last point, that the action being against the defendant as executor, he should have been sued as such on the record; the answer is, that an executor

(a) 1 B. & B. 219.

(b) 7 A. & E. 240; See S. C. 2 N. & P. 260.

receiving the money of third parties, is personally answerable for it.

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Whitehurst, in support of the rule. The rule with respect to not granting new trials where the amount is under a certain sum, does not apply to the case of a misdirection. [*Coleridge, J.*—I do not see how you can call the present a misdirection, as it is not stated in the notes of the trial how the under sheriff left the case to the jury.] With respect to the second objection, the plaintiff in a personal action must prove not only the will itself, but the probate. The notice to admit made no mention of this supposed extract from the registry, and it should therefore have been proved to be a true extract in the ordinary way. Besides, the copy is only receivable as secondary evidence, and there is no proof that the original was ever in our possession so as to let in secondary evidence. The plaintiff had not regularly exhausted the primary evidence. The Ecclesiastical Court has no power to grant copies of wills. The legal evidence in the absence of the probate, is an exemplification of it with the original will; or the production of the original act book of the Court, recording the grant of the probate. In *Doe dem. Bassett v. Meo* (a), and in *Doe dem. Edwards v. Gunning* (b), there was no other record of the probate than that indorsed on the will itself. Here, if the practice be to enter it in a book, the book itself should have been produced. As to the third point, it is submitted that it was incumbent on the plaintiff to describe the defendant as executor, the action being for a legacy. There was no right of action against him in this case, except as executor; and an action will not lie against an executor for a legacy, except there be an assent by him, and there was none proved in this case; *Williams on Executors*, p. 1516, 3rd ed.; *Com. Dig. "Plead."* (2 D 2).

Cur. adv. vult.

(a) 7 A. & E. 240; See S. C. (b) 7 A. & E. 240; See S. C.
 2 N. & P. 266. 2 N. & P. 260.

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COLERIDGE, J.—This was a rule to enter a nonsuit, on account of evidence improperly received.

The action was for money had and received, the only plea *nunquam indebitatus*. The money was alleged to have been received in the lifetime of Elizabeth Gale, and she was said to be entitled to it under the will of John Gale, of which defendant was one of the executors. It was necessary for plaintiff to shew the right of the testatrix under this will, and he proved a notice on the defendant to produce the probate for that purpose. The defendant did not produce it, and it not being objected that there was no evidence that it was in his possession, the plaintiff put in a Judge's order, made by consent, for the defendant to admit an office copy of the will, stated in the admission to have been proved at Marlborough, 19th April, 1813. Then he tendered a copy of a will, which was not disputed to be the admitted office copy. At the foot of this was appended an apparently original signature of a person describing himself as registrar, and what appeared to be a copy of the act of Court, stating the fact of the will having been proved, and the administration committed to the defendant and his co-executors. No evidence was offered that the signature was that of the registrar, or that this copy of the act of Court was correct.

It was objected that this copy of the will was not evidence of the contents; it was, however, received; and, after a good deal of consideration, I think properly. It must be admitted that no advantage can be taken by the plaintiff of the signature, or other matter appended; for they are not included in the admission, and no evidence was offered to prove them to be what they purported to be.

The plaintiff was bound to shew himself entitled under a will proved in the Ecclesiastical Court. If the probate had been put in, without further proof of the due execution of the will, his title would have been complete. Here the admission is by one who withholds the probate, and against whom, generally speaking, secondary evidence is admissible.

It amounts to this, that the copy produced is a true copy of the will made by the officer of the Court, and that that will has been duly proved. It was contended that the withholding of the probate by the defendant did not make secondary evidence admissible, until all primary evidence was exhausted, and that the plaintiff therefore was bound to have produced the original Act Book of the Court, recording the grant of probate. It is clear, however, that as that is a public document, an examined copy of it would be as good evidence as the original. But had the probate been lost, without having recourse to the Act Book, or an examined copy of it, an exemplification of the probate, or certificate of the grant under the seal of the Court, or even an examined copy, would have been receivable as secondary evidence. I do not rely on the case of *Gorton v. Dyson* (a), which is not very clearly reported; the Court there had received as secondary evidence of the probate the original will, produced by an officer of the Court, with the seal of the Court impressed on it, and indorsed as the instrument on which probate was granted: they received this after notice to produce the probate, but without proof that that was in the possession of the defendant. Mr. *Starkie* suggests (b) that it was receivable as original evidence, and it would seem to have been more correctly receivable as such than as secondary; sealed and indorsed as it was, it seems to have had on it the original act of the Court—all that in other cases the act or ledger book itself would have contained; and it does not appear how the plaintiff had entitled himself to produce secondary evidence, unless it is to be presumed that the executor is always de facto in possession of the probate, as to which I express no opinion.

In this case the plaintiff has, however, entitled himself; and the defendant, by his admission, has not only authenticated the copy, but removed any difficulty as to the fact that the will in question has been duly proved.

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(a) 1 B. & B. 219; See S. C. 3 Moore, 558.

(b) *Treatise on Evid.* vol. 1, p. 302, n. (y), 3rd ed.

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A second point was made, that the defendant ought to have been sued as executor. It should be observed that the defendant is not at liberty to contend that the action law will not lie for the legacy, as this point was not made in the Court below. Removing this difficulty from the case it is clear on principle and authority, that an executor receiving money to the use of a third person, is personally answerable. The case of *Ashby v. Ashby* (a) is a strong authority; the Judges there would gladly have sustained the joinder of counts for money paid to the use of defendants, as executors, and for money had and received by them as such, with a count on an account stated by them as executors for monies owing in that capacity to the plaintiff but they found themselves compelled to decide that this could not be joined. The second count, even as thus framed, they all agreed made the executors personally liable. The rule must therefore be discharged.

Rule discharged. (b)

(a) 7 B. & C. 444; See S. C. 1 M. & R. 180.

(b) See *Wilkes v. Hopkins* & Others, Com. Pleas, Trin. T. 18

IN re WEBB.

Where an attorney, who was entrusted by executors with a sum of money to pay certain legacy duties, had given an undertaking so to apply it, but had failed to do so: the Court refused to exercise its summary jurisdiction to

compel him to refund the money; it not appearing that he had been otherwise employed by executors in his professional character, or that the employment in question was one which necessarily required an attorney to perform.

LUSH applied for a rule calling on an attorney of the name of Webb to shew cause why he should not refund a sum of money entrusted to him for the purpose of paying certain legacy duties. It appeared from the affidavit, in support of the motion, of the executors of one R. Sangster, that about the month of June, 1844, Mr. Webb, "who was then and still is an attorney of this honorable Court, was retained and employed by and on behalf of the deponents as sub-attorney, to act for these deponents in the matters relating

to the said estate." That in performance of the trusts of the estate, the deponents did dispose of certain stock of the testator to the amount of 250*L.*, and "did pay the same into the hands of Mr. Webb, as such attorney as aforesaid, for the express purpose, and with directions that the same should be forthwith applied by the said Mr. Webb, in discharging the legacy duty on certain legacies bequeathed by the will of the testator." That Webb thereupon gave the following undertaking :

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"24th July, 1844.

"Memorandum. Mr. Perkins having paid me the sum of 250*L.*, being the produce of 20*L.* per annum long annuities, I hereby undertake to apply the same for the purposes of such deposit, namely, to pay the legacy duties to that amount.

"R. W. WEBB."

That Webb had afterwards stated that he had paid the money into Somerset House, in discharge of the legacy duty; but that this statement had been since discovered to be incorrect; and that a demand had been made on Webb for the money, and notice of this application given to him. Under these circumstances, it is presumed that the Court will grant the present application. The case of *In re Aithin* (a) is in point. [*Coleridge, J.*—Is it stated that Mr. Webb has been engaged in any other business for the parties than this single transaction?] No, but it is sworn that he was "employed as attorney to act for the deponents in the matters relating to the estate;" and that this sum of money was paid to him, "as attorney," for the express purpose of paying the legacy duty, which he has not done. *Ex parte Bodenham* (b), recognises the authority of *In re Aithin*, and shews that the Court will interfere in a

(a) 4 B. & A. 47.

(b) 8 A. & E. 959.

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summary manner, where parties have confided attorney, relying on his character as such.

Cur. adv.

COLERIDGE, J.—This was an application on behalf of certain parties who were executors, to compel an attorney to refund a certain sum of money which had been paid into his hands for the purpose of paying the legacies of a deceased testator. They state in their affidavit, that they employed him as their attorney in the matters relating to the estate; and that they paid the money into his hands "as such attorney;" but they do not state any circumstances to shew that he had done any work for them in a professional capacity; nor any thing from which it could be inferred that he acted generally as their attorney. The question, therefore, is, whether it is shewn that the matters were so connected with his employment as attorney, that the Court will exercise its summary jurisdiction in the way prayed for. Two cases have been cited in support of this application, and these cases have been considered as carrying the jurisdiction of this Court to its utmost limit. Some Judges, indeed, have thought that the case of *In re Aitkin* (a) went too far; but, although I am disposed to concur in the propriety of that decision, I am not prepared to go beyond it. In that case the attorney had been employed to collect and get in the effects of a deceased party; and there could be no doubt that he was so employed, because he was an attorney. The observations will apply to the case of *Ex parte Bodeni*. I cannot see that the present case resembles either of the cited decisions in its circumstances. Here, any one, whether or not an attorney, could equally well have paid the money, and there was no necessity for employing a professional

(a) 4 B. & A. 47.

(b) 5 A. & E. 95.

person to do so. If the Court were to interfere in a matter of this kind, it would be difficult to say where it could stop.

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Rule refused.

CROFTS v. BROWN.

(*In the full Court*).

A RULE nisi had been obtained to rescind a Judge's order permitting a writ of *distringas* to issue in this case. The affidavit on which the writ had been granted, stated the calls to have been made "at the residence of the defendant," without stating where that residence was; and that a copy had been left there with a person who described himself to be the brother of the defendant. The affidavit also stated, that the defendant had afterwards called on the plaintiff, and "said that he should upset plaintiff's *distringas*, for the writ had been left with his brother and not with him." The defendant, in his affidavit, distinctly denied that he ever knew of any writ of summons or other process having been issued against him, until on the day referred to he called on the plaintiff, who informed him that a writ had been left at his house with his brother, and that a *distringas* had issued; on which, he replied, that if that were true, he should apply to set it aside, as he knew nothing of any process being issued against him. The defendant was described in the writ of summons, as "of No. 6, Kennington Green, in the county of Surrey," which was also the description he gave of himself in his affidavit, on which the present rule was granted.

The affidavit for a *distringas* should state where the residence of the defendant is situated.

Petersdorff shewed cause, and contended that it was sufficient that it now appeared that the writ was left at the defendant's residence, as described in the writ of summons, without stating in the affidavit, on which the writ of

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distringas was obtained, where that residence was. He submitted also, that the writ of summons was brought home to the defendant's knowledge.

Watson and Pearson in support of the rule. It is necessary that the party who serves the process, should state where the defendant's residence is; *Hulton v. White* (a). The Court will require that the stringent remedy provided by the act, should be strictly pursued. [*Lord Denman*, C. J.—What do you say as to the admission, that the writ of summons had come to the knowledge of the defendant?] That at most would justify an application to enter an appearance, and not a proceeding by *distringas*. [*Patterson*, J.—The Courts now require actual personal service, in order to enter an appearance] (b).

LORD DENMAN, C. J.—The defendant may certainly have been told that his brother had been served; but I do not think there is any sufficient admission in this case to remedy the defect.

PER CURIAM.

Rule absolute.

(a) 2 M. & G. 295.

lower, ante, vol. 1, p. 599; S. C.

(b) See *Goggs v. Lord Hunting-*

12 M. & W. 503.

HAWKYARD and another, Executors of BEARD v. STOCKS and others.

A cause, after issue joined, having been referred to arbitration, but no power

THIS cause after issue joined, was referred by a Judge's order to arbitration, "the costs of the cause to abide the event, and the costs of the reference and award to be in the given to award a verdict; the arbitrator awarded a verdict to be entered for the defendants, and directed the plaintiffs and defendants respectively to execute mutual releases of all manner of actions, &c.: Held, that the award was bad for excess of authority, and that that portion of it ordering a verdict to be entered could not be rejected as redundant; since, if struck out, the meaning of the award would be altered.

An affidavit verifying a copy of the award to be a true copy, need not state that the copy has been compared with the original award.

Parties are not bound to take office copies of exhibits attached to affidavits.

discretion of the arbitrator ;” but no power was given to direct a verdict to be entered. The award, which was made “ of and concerning the premises,” directed that a verdict should be entered for the defendants on all the issues joined between the parties in the cause ; and that the plaintiffs and the defendants should respectively bear and sustain the costs incurred by them respectively in and about this reference, and should respectively pay a moiety of the costs of the award ; and that the plaintiffs and defendants should, respectively, on the request and at the costs and charges of the party requiring the same, sign and seal, and as their respective act and deed deliver, each unto the others of them, mutual general releases in writing, of all and all manner of action and actions, cause and causes of action, bills, bonds, covenants, debts, suits, specialties, controversies, claims and demands whatsoever.

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A rule had been obtained in last Michaelmas Term, &c., to set aside the award on the following grounds :

1. That the arbitrator had not awarded on all the matters in difference between the parties, and that the award was not final.

2. That the arbitrator had exceeded his authority in awarding a verdict to be entered for the defendants.

The rule was drawn up on reading the affidavit of W. P. Dickson, clerk to the plaintiffs’ agents, and the copy award, or umpirage thereto annexed. Dickson deposed “ that the paper writing hereunto annexed marked D, is a true copy of the award or umpirage of George Thompson Lister, of Bradford, in the county of York,” &c., “ as this deponent has been informed and believes :” and that he received the said paper writing from the plaintiffs’ attorney in the country.

Addison now shewed cause, and took a preliminary objection that, although, the affidavit of Dickson referred to a paper annexed, there was no such paper attached to the affidavit ; and, therefore, the award was not before the Court ; and

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that another affidavit to which a copy was annexed, was not properly entitled in the cause, and, therefore, could not be used. He cited *Sherry v. Oke* (a). He also contended that the affidavit of Dickson, even had a copy of the award been annexed, was informal; as it should have stated that the copy of the award had been compared with the original.

Cowling, contra. This is only an office copy of the affidavit, and the practice now is not to take office copies of papers annexed to the affidavits. It is clear the award must have been attached to the original affidavit when sworn, or the rule could not have referred to it. The affidavit is sufficient in terms, as the party seeking to set aside the award, may have no opportunity of seeing the original.

COLERIDGE, J.—The Master informs me that parties are not bound to take office copies of papers annexed to an affidavit. With respect to the objection, that the affidavit should have stated that the copy was compared with the original, it is a sufficient answer, that cases may frequently occur, where a party may never see the original award, but only have a copy furnished him.

Addison. With regard to the award, it must be admitted that the arbitrator has exceeded his authority in directing a verdict to be entered for the defendants. But that portion of it may be treated as surplusage, and the award is sufficiently final without it; for the award of mutual releases would settle the costs in the action, and amounts to a *stet processus*. He referred to *Birks v. Trippet* (b), *Wharton v. King* (c), and *Wynne v. Edwards* (d).

Cowling, in support of the rule, was not called upon.

(a) 3 Dowl. 349.

(b) 1 Wms. Saund. 32.

(c) 2 B. & Ad. 528.

(d) 12 M. & W. 708; See S. C. ante, vol. 1, p. 976.

COLERIDGE, J.—The costs of the cause were to abide the event of the award. By the award of a verdict for the defendants, the arbitrator must clearly have meant to give the defendants the costs; and the argument against the present rule is, that that intention is not inconsistent with the other parts of the award, if standing alone. But if I am to take no notice of that part of the award which directs the verdict to be entered for the defendants; then they will have to execute a release, and so lose the costs of the action which the arbitrator meant to give to them. The rule as to redundancy not vitiating an award, only applies where the redundant matter being struck out, the sense of the award remains the same. Here the words in the release “all manner of actions,” mean all manner of actions excepting this one; and, therefore, would not be final, if so much of the award as relates to the finding a verdict for the defendants were to be struck out. The arbitrator, it is admitted, has exceeded his authority in awarding a verdict to be entered; and, as that part cannot be rejected without altering the sense of the rest of the award, this rule must be made absolute.

1845.
 HAWKYARD
 and Another
 v.
 Stocks
 and Others.

Rule absolute.

REGINA v. BIRD and Others.

PEACOCK applied for a certiorari to remove an indictment into the Queen's Bench, which had been preferred against the defendants at the Clerkenwell Sessions, for improperly keeping a burying ground, the same being a nuisance to the neighbourhood. He submitted that the indictment, being the first preferred of the kind for such an offence, questions of law would most likely arise, on which

A rule for a certiorari to remove an indictment from the sessions into this Court, on the ground that grave questions of law are likely to arise, and that a view is

necessary, which cannot be had at the sessions, is not necessarily a rule absolute in the first instance; but it rests in the discretion of the Court so to grant it.

1845.
 REGINA
 v.
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 and Others.

it would be desirable to have the opinion of the highest Court of Judicature. And that the case was such, that a view was absolutely necessary for the defence of the defendants, which could not be had by the jury summoned to serve at the Sessions. That a view could only be had by a special jury, which it was the intention of the defendants to have on the trial of the indictment, if the indictment were removed.

H. S. Wilde appeared to oppose the application.

Peacock. This is a rule which is granted, absolutely, in the first instance, and cause is never shewn in similar cases. In *Regina v. Spencer (a)*, Mr. Justice *Littledale* says, "In cases of misdemeanor, the rule for a certiorari is absolute in the first instance, but in cases of felony, it is a rule nisi."

H. S. Wilde contended that the practice was different, and that the case quoted, shewed that it was matter of discretion with the Court, to say on what terms the rule should be granted.

COLERIDGE, J.—I have certainly known many instances in which cause has been shewn in applications of this kind. If you take the whole together of what Mr. Justice *Littledale* says, in the case of *Regina v. Spencer*, that learned Judge evidently seemed to think that it must depend on the circumstances of each case. You may take a rule nisi.

Rule nisi.

(a) 8 Dowl. 127.

1845.

TRENT v. HARRISON.

THIS was a rule calling on the plaintiff to shew cause why it should not be referred to one of the Masters, to ascertain which of the sums stated in the affidavit of increase in the above cause, to be paid to the witnesses, were not paid at the time of the taxation of the plaintiff's costs; and why whatever sums were not so paid should not be refunded to the defendant by the plaintiff; and why the Master's allocatur and the judgment should not be reduced accordingly; and why the plaintiff should not pay the costs of this application.

The affidavit of increase was made by the plaintiff's attorney; but it appeared on the affidavits that he had not paid the witnesses himself, but had given a cheque to the plaintiff to pay them their respective amounts.

With respect to a witness of the name of Joseph Such, to whom, in the affidavit of increase, a sum of 4*l.* 4*s.* was sworn to have been paid, of which the Master allowed only 3*l.* 3*s.*; it appeared that he had not, in point of fact, been paid; although he had, as was alleged on the part of the plaintiff, given a receipt for the money; an arrangement having been made that as he had goods of the plaintiff's in his hands for sale, he should pay himself out of the proceeds. With regard to another witness of the name of Kelly, it appeared that the plaintiff had given his I. O. U. for the amount; for which also, as was alleged by the plaintiff, a receipt had been given. It appeared that since the taxation, some disputes having arisen, Such had been paid the sum of 3*l.* 3*s.*, and that the I. O. U. given to Kelly had also been paid.

Where it appeared that the costs of certain witnesses sworn to have been paid in an affidavit of increase, and allowed in the Master's allocatur, had not in point of fact been paid till after the allocatur was granted; the Court ordered the plaintiff to refund such sums to the defendant; although no intention of fraud was imputed to the plaintiff.

Humfrey shewed cause. It appears clearly on the affidavits, that at any rate the witnesses are now all paid, and the defendant cannot therefore be entitled to have any sums refunded. It would be productive of some hardship

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upon the jury if he were bound to pay the amount absolutely, when the costs may be afterwards disallowed or reduced on taxation. There was no attempt at this case.

Grice, in support of the rule. The successful party is only entitled to such costs as he has actually paid at the time of the taxation; *Lopes v. Dr Tait* (a). He is not to be permitted to swear to sums having been paid which have not been paid, merely on the chance of getting them allowed.

Curr. ad.

COLERIDGE, J.—This was an application to refound the Master to ascertain what sums stated in the bill had been increased costs to have been paid to witnesses, paid at the time of taxation, and to cause such sums to be refunded to the defendant by the plaintiff. It would have been more correct to have asked for a refunding of sums sworn to have been paid and allowed by the Master. The rule must be taken to have this meaning.

Upon examining the affidavits, it certainly does appear that with regard to two of the witnesses at the taxation the affidavit was incorrect; with regard to one, to whom it was sworn that 4*l.* 4*s.* were paid, of which the Master allowed only 3*l.* 3*s.*, nothing had been paid, the reason alleged being that the witness had property of the plaintiff in his hands for sale, out of the proceeds of which he might pay the debt. With regard to another, that instead of payment, an acknowledgment had been given for the amount, and, as alleged on behalf of the plaintiff, a receipt given for it by the witness. It is unnecessary in the present instance, to impute to the plaintiff or his attorney any intentional fraud; the affidavit is certainly untrue, and the practice disclosed is irregular, and capable of being abused to the pre-

(a) 3 B. & B. 292; See S. C. 7 Moore, 120.

fraud on the party, and oppression as well as fraud on the witness. The practice requires that the witnesses should be actually paid before the opposite party be charged. The affidavit in ordinary use, as in this case, directly asserts it. There may be inconvenience in this, because the Master may disallow all or part of the money so paid; but the Courts have preferred to submit to this possible inconvenience (which will be small in actual occurrence, if the attorney knows, as he ought to do, what are the proper payments to be made, and limits himself to them) rather than lay the party and the witnesses open to the consequences of a different rule, which would encourage a practice of claiming as much as possible from the opponent, and paying as little as the witness, often poor and ignorant, can be induced or compelled to accept.

It has not been made a ground of the motion, but it having appeared before me, I cannot forbear to notice another serious inaccuracy in this affidavit; the deponent swears that he paid the sums specified; now it appears that he did not himself pay any witness, but gave the plaintiff a cheque for the purpose. He may have believed that the plaintiff had paid them, but he should have stated the fact as it was; and if he had merely said he had been informed and believed that the plaintiff had paid them, I cannot think that the Master would have allowed a taxation to proceed, however ordinary and regular the sum might have appeared, without an affidavit of payment from the plaintiff. In this case it does not appear that the plaintiff or any one had informed the deponent of the payment in fact; he was content to swear upon a general impression with an easiness, which I very much disapprove of. I have already said that I do not feel myself called on to impute fraud, but the defendant is entitled to have the rule he prays for, even though the moneys have since been paid to the witnesses; for the plaintiff's right, as against him, is founded solely on the allocatur.

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There is, however, no reason why the plaintiff should pay the costs; he has personally done no wrong, and the defendant has sustained in the end no substantial injury. The costs are not prayed for as against the attorney.

Rule absolute, without costs.

DOWNES v. GARBETT.

A writ of summons served in the county of M., but describing the defendant as "of W., in the county of S., but now in the county of M.," is irregular.

LUSH had obtained a rule to set aside the writ of summons which had been issued in this cause, or the copy and service thereof, with costs; on the ground that the residence of the defendant was improperly described in the writ of summons, as "of Wellington in the county of Salop, but now in the county of Middlesex." The writ had been issued, and service effected in the county of Middlesex. He cited *Hill v. Harvey* (a).

Miller shewed cause. The Uniformity of Process Act (2 Wm. 4, c. 39, s. 1), enacts, that "in every such writ and copy thereof, the place and county of the residence, or supposed residence, of the party defendant, or wherein the defendant shall be, or shall be supposed to be, shall be mentioned." Upon the affidavits filed in answer to this rule, it appears that the defendant had removed from Wellington, and was supposed to be residing somewhere in Middlesex, although the exact place could not be discovered. The plaintiff has, therefore, given the best description in his power. The intention in the writ of summons is to give a *descriptio personæ*, that the defendant may know he is the party meant, and not a *designatio personæ*, as in writs of *capias*. He referred to *Border v.*

(a) 4 Dowl. 163; See S. C. 2 Cr., M. & R. 309.

Levi (a), *Hill v. Harvey* (b), *Ward v. Watt* (c), *Margetson v. Tugghe* (d). The case of *Cotton v. Sawyer* (e), differs from the present; for there there was no description of the place of abode. In *Simpson v. Ramsay* (f), the defendant was described as "to be heard of at Peele's coffee-house, Fleet Street, in the city of London;" and the case of *Stevenson v. Thorne* (g), was where a blank was left for the defendant's residence. He referred also to *Jelks v. Fry* (h), and to *Norman v. Winter* (i).

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Lush, contra, was stopped by the Court.

COLERIDGE, J.—I am very unwilling to push these matters to any unnecessary degree of strictness; yet I think that on the present occasion I must make this rule absolute. The defendant has been served in Middlesex with a writ describing him as "of Wellington, in the county of Salop, but now in the county of Middlesex." And the question is, whether this is a sufficient compliance with the act of Parliament, which not only gives a certain form, but also prescribes certain requisites which the writ must contain, namely:—"the place and county of the residence, or supposed residence, of the party defendant, or where the party shall be, or shall be supposed to be, shall be mentioned." The act evidently refers to two states of facts, where the defendant's residence, or supposed residence, is known, and he is known or supposed to be residing there; or where he has left his place of residence, and is known, or supposed to be, in some other place. It is said that in the present case the writ gives an accurate and minute description of the

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| (a) 3 Dowl. 150; See S. C. 1 Bing. N. C. 362; 1 Scott, 270. | (f) 5 Q. B. 371; See S. C. 1 D. & M. 396. |
| (b) 4 Dowl. 163; See S. C. 2 C., M. & R. 307. | (g) <i>Ante</i> , p. 230; See S. C. 13 M. & W. 149. |
| (c) 5 Dowl. 94. | (h) 3 Dowl. 37. |
| (d) Id. p. 9. | (i) 7 Dowl. 304; See S. C. 5 Bing. N. C. 279; 7 Scott, 251. |
| (e) 2 Dowl. 310, N. S.; See S. C. 10 M. & W. 328. | |

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defendant, so that he must have known that he is the person meant by it. But it is not sufficient that the writ should do this, if it fail to comply with the express requisitions of the act. If the plaintiff choose to adopt the latter alternative in the act, he must comply with its provisions, by giving the place as well as the county where the defendant is supposed to be; and in this view I do not see that the words "of Wellington, in the county of Salop," aid the matter at all; because having taken the step of issuing it in the county of Middlesex, no place of residence, or supposed residence within that county is given. The rule must, therefore, be absolute, but without costs.

Rule absolute (a) without costs.

(a) His Lordship's attention the rule was prayed for in the was not directed to the fact that alternative.

RENNIE v. BRUCE.

Where a defendant upon being arrested in 1845, upon a writ of *capias* issued under the 1 & 2 Vict. c. 110, s. 3, was served with a copy of a writ of summons, tested in 1840, and directed to the defendant in another county than that in which the arrest took place; and also with a copy of the writ of *capias*, which was without date, and directed, "To the — greeting." *Held*, that the defendant was entitled to be discharged out of custody; and that he need not make it a part of the rule that the writs or the copies of the writs should be set aside.

THIS was a rule, calling on the plaintiff to shew cause why the defendant should not be discharged out of custody of the sheriff of Surrey, as to this action, on the ground of irregularity, with costs.

The defendant, it appeared, had been arrested on the 16th of April in the present year, by the officers of the sheriff of Surrey, on a *capias* issued by virtue of the 1 & 2 Vict. c. 110, s. 3; and on being taken into custody, had been served with a copy of the writ of summons in the above cause, which was directed "To Duncan Bruce, of Liverpool, in the county of Lancaster," and was tested on "the ninth day of April, in the year of our Lord one thousand eight hundred and forty;" and at the same time, was also

It is not necessary in a rule nisi to set aside proceedings for irregularity, to specify the grounds of irregularity on which the party relies.

served with a copy of the writ of *capias*, which contained no sheriff's name, but was directed "To the — greeting;" and was tested "the — day of April, one thousand eight hundred and forty-five." The copies of these writs were attached to the affidavit of the plaintiff, who distinctly denied that he had any present intention of leaving the country. On the part of the plaintiff, the original writ of *capias*, which was perfectly regular in form, was produced in Court and verified by affidavit.

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Bovill shewed cause. The grounds of irregularity relied on, should have been specified in the rule, and the application should have been to set aside some particular proceedings in which the irregularity occurs. It will be contended by the other side, that the copy of the writ of summons is defective; but even if so, that cannot affect the writ of *capias*, which is an entirely collateral proceeding, for the further security of the plaintiff, and independent of the action; *Ireland v. Berry* (a); *Regina v. Sheriff of Montgomeryshire* (b). [*Coleridge, J.*—If the writ of *capias* be entirely a collateral proceeding, it can only issue when an action is commenced; and an action to be commenced, must be properly commenced.] With respect to the defects in the copy of the writ of *capias*, namely, that it does not contain the name of any sheriff or officer to whom it is directed, and that it has no teste; the question is, whether the plaintiff is to be prejudiced by the sheriff having delivered an imperfect copy. In the case of a writ of summons, the plaintiff is bound to furnish the sheriff with a copy, to be delivered by him to the defendant; but in the case of a writ of *capias* under the 1 & 2 Vict. c. 110, s. 3, no such provision is to be found. The defendant is only entitled to a copy, by virtue of a direction to the sheriff to furnish a copy, in the form given of the writ itself. If the sheriff does not obey the injunction of the writ or

(a) *Ante*, vol. 1, p. 866.

(b) 1 Dowl. 388, N. S.; See S. C. 9 M. & W. 448.

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furnishes an incorrect copy, the remedy should be against him for neglecting his duty. At any rate, the Court will order an amendment where it does not appear that the defendant will be in any degree prejudiced: *Stevenson v. Castle* (a), *Popkins v. Smith* (b), *Sutton v. Burgess* (c), *Plock v. Pacheco* (d), *Bilton v. Clapperton* (e). [Coleridge, J.—There may be a distinction between an amendment in a copy of a writ, and an amendment in the writ itself. The copy may, perhaps, be considered as the act of the plaintiff.] That cannot be so with respect to the copy of the capias, which is furnished by the sheriff. The Court in *Plock v. Pacheco* refer to their powers, under the 6th section, on a motion to discharge a party from arrest, “to make such order therein as to such Judge or Court shall seem fit.” In *Popkins v. Smith* there was nothing for the Court to amend by. The case of *Galloway v. Bleaden* (f) shews that the Court will make an amendment even after verdict, and that the only question is one of costs, which the plaintiff is willing to pay. He cited also *Kirk v. Dolby* (g).

Crompton, in support of the rule. The form of this motion is perfectly correct. It is never necessary, in applications like the present, to specify the irregularity, as the party may discover it on perusing the affidavits. The defendant could not apply to set aside the writs, for they may be correct enough; nor the copies, for they may be true copies. The proper form is the one adopted, namely to discharge the defendant out of custody. The 5th section of the 1 & 2 Vict. c. 110, shews, that to warrant

(a) 1 Chit. Rep. 349.

(e) 9 M. & W. 473; See S. C.

(b) 7 Bing. 434; See S. C.

1 Dowl. 386, N. S.

5 M. & P. 319.

(f) 1 M. & G. 247; See S. C.

(c) 1 C., M. & R. 770; See

1 Scott, N. R. 170.

S. C. 3 Dowl. 489.

(g) 8 Dowl. 766; See S. C.

(d) 9 M. & W. 342; See S. C.

6 M. & W. 636.

1 Dowl. 380, N. S.

writ of *capias* under the 3rd section, a writ of summons must have been previously sued forth; *Brooke v. Snell* (a). Now, in the present case, it does not appear that any writ of summons has been sued forth, which can support the action. The copy writ of summons, with which the defendant has been served, is tested in 1840, and, therefore, is mere waste paper now. It is directed to the defendant in Liverpool, and is served in the county of Surrey. The copy writ of *capias* is equally defective. The 1 & 2 Vict. c. 110, s. 3, directs that the writ of *capias* shall bear date the day on which the same shall be issued. Now, in the present case, it bears no date at all. It has been decided in this Court, that if tested on a Sunday, the writ would be void (b). Besides, it is directed to no one, either sheriff or constable, to execute. The sheriff is considered as the agent of the plaintiff, in executing process; and, therefore, if he does not comply with the requisitions of the statute, the plaintiff is answerable for it; *Shearman v. M'Knight* (c). It is said, however, that the Court will amend the defects; but in the cases where the Court has exercised that power, there has been something to amend by. In *Nicol v. Boyne* (d), the error there was of a more trifling nature, the writ being directed to the "sheriff" of London, instead of the "sheriffs," and yet the Court refused to amend. So in *Barker v. Weedon* (e), and *Storr v. Mount* (f), equally trifling defects were held fatal. The Court cannot now, by any amendment, render that arrest legal, which was illegal at the time of making it. [*Coleridge, J.*—What do you say to the words in the 6th section, giving the Court the power "to make such other order therein as to such Judge or Court shall seem fit."] That is for the protection of the defendant, and contemplates an order for his benefit. It is,

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(a) 8 Dowl. 370.

(b) *Semble, Hanson v. Shackleton*, 4 Dowl. 48.

(c) 5 Dowl. 572.

(d) 2 Dowl. 761; See S. C.

10 Bing. 339; 3 M. & Scott, 810.

(e) 2 Dowl. 707; See S. C. 1 C., M. & R. 396; 4 Tyr. 860.

(f) 2 Dowl. 417.

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probably, with the view of enabling the Court to enter into the merits of the case.

Cur. adv. vult.

COLERIDGE, J.—This was an application to discharge the defendant out of the custody of the sheriff of Surrey, on objections to the copy of the writ of summons, and of the *capias*.

The objections to the former were, that on the face of it the writ appeared to be directed to the defendant in the wrong county, and to be tested in 1840; in the latter, the direction was left in blank, without stating sheriff or county or place, and there was no day or year in the teste (*a*).

It was answered that these objections could not be gone into, because not specified in the rule; nor relied on, if they had been, because the rule did not ask to have either writ or copy set aside.

As to the first, it is not necessary to state in the rule the irregularity complained of; it is sufficient, if it appear upon the affidavits. In the case of a summons it is necessary, because that is commonly taken out without filing any affidavit, so that the opposite party might be in entire ignorance of what he was called on to answer, if it were not so stated. As to the second, the only question is, whether the defendant can be discharged out of custody, which is the thing prayed for, without setting aside the copies in which the objections appear. And I am of opinion that he may; for it would appear, assuming, as I must do, on these affidavits, that the copy is correct, that what is called the writ of summons, in this case, was merely waste paper; as it must be taken to have issued in 1840; so that there was no foundation on which the *capias* could be rested; and with regard to that writ, which was shewn to have been correct, the provisions of the statute would appear not to have been complied with, as to the service of a copy; the

(a) There was no day, but there was a year.

plaintiff being in the dilemma of having acted on a bad writ, or of having served a copy substantially defective.

It might be unnecessary, under these circumstances, to consider whether the writ of summons is so merely collateral to the arrest, that the objections, now urged to it, are immaterial; but that, as the stress of Mr. *Bovill's* argument was a prayer that I would amend the proceedings, I am obliged to consider whether it will not be necessary, in order to maintain the arrest, to extend the amendment to the summons as well as the *capias*. For certain purposes, no doubt, the proceeding to arrest, under the 1 & 2 Vict. c. 110, is collateral to the main course of the cause; but the statute itself makes it a condition precedent to the exercise of the power it gives, that an action shall have been commenced; this is clear from comparing the 3rd and 5th sections together, and the practice is quite settled accordingly. But assuming as I must do on the present affidavits, that the copy of the summons is correct, no action can be said to have commenced even up to this moment; for a writ of summons issued in 1840 is now merely waste paper. If, therefore, I am to help the plaintiff's case by amendment, the amendment must extend to the writ of summons, as well as the copy.

The cases of *Plock v. Pacheco* (a), and *Bilton v. Clapper-ton* (b), were cited, and I entirely agree with the principles there laid down; and they certainly authorize a more liberal exercise of the power of amendment, than the resolution of the Judges mentioned in *Lakin v. Watson* (c). But, unfortunately, nothing stated in the affidavits discloses any thing by which the writ of summons can, in this case, be amended. I should, in fact, be making an entirely new writ, and the materials would be supplied merely by guess work. In the first of these cases, there was the Judge's order for the arrest, and the affidavit of debt, by which to amend, and that is relied on by *Alderson*, B.; in the latter there was the affidavit of debt, describing the plaintiff pro-

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(a) 9 M. & W. 342; See S. C. 1 Dowl. 386, N. S.

1 Dowl. 380, N. S.

(c) 2 Cr. & M. 685; See S. C.

(b) 9 M. & W. 473; See S. C. 2 Dowl. 633.

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perly. But assuming the writ to be amended, the defect in it is of such a nature, that the objection will still remain, that at the time of issuing the *capias* this action had not been commenced; and the consequence, besides, will follow, that the copy will immediately become defective. Now, it has been decided in *Byfield v. Street* (a), that the Court has no power to amend the copy; it was the act of the plaintiff, and is now in the control of the defendant. To amend the copy is, in other words, to allow the plaintiff to serve a new copy; but it is obvious, that that will not cure the defects of the original service.

It does not appear to me upon the whole, that I can make the necessary amendments, and the rule, therefore, must be absolute.

Rule absolute.

(a) 10 Bing. 27; See S. C. 3 M. & Scott, 406; 2 Dowl. 739.

REGINA v. H. MORICE, Clerk, and Another, Justices of Hertfordshire.

Where a rule for a certiorari to bring up an order of quarter sessions, confirming on appeal an order of justices under the Highway Acts, "with all things touching the same," had

been obtained, and a return made, which did not include the order of justices, the Court made absolute a rule for a certiorari to remove the order of justices, although obtained pending the former rule.

An order of justices at special sessions, under the 4 & 5 Vict. c. 59, s. 1, must show on the face of it, that the road in respect of which they proceed to adjudicate, is within the division for which the special sessions are held; but it need not show in what proportion of the rate the sum to be paid stands; nor out of which of the three rates permitted by the 5 & 6 Wm. 4, c. 50, the sum is to be taken.

The six months within which a certiorari must be obtained, run from the date when the quarter sessions adjudicate on the appeal, and not from the date of the original order of justices.

The powers conferred by the 4 & 5 Vict. c. 59, s. 1, on "the justices at any special session for the highways holden after the passing of this act," apply only to a special sessions holden under the 5 & 6 Wm. 4, c. 50, s. 45.

H. HAWKINS had obtained a rule in Trinity 'Term, 1844, calling on the Rev. Henry Morice, Clerk, and John George Fordham, Esqr., two of her Majesty's justices of the peace for the county of Hertford, to shew cause why a writ of certiorari should not issue, to remove into this Court the following order under their hands and seals, made at a special sessions of the highways, holden at

Royston, in and for the division of the hundred of Odsey, in the said county ; for the purpose of being quashed :—

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“ Hertfordshire, to wit.—At a special sessions of the highways, holden at the Bull, at Royston, in and for the division of the hundred of Odsey, in the county of Hertford, on the 21st day of June, 1843, by her Majesty’s justices of the peace, in and for the county of Hertford, acting in and for the said division.

“ Whereas, William Hollick Nash, clerk of the turnpike trust, called the Baldock and Bournbridge Trust, hath this day exhibited an information before us, the said justices, at the said special sessions, giving us, the said justices, to understand and be informed that the funds of the said turnpike road, after payment of the principal and interest monies due to the commissioners, are wholly insufficient for the repair of the turnpike road, called the Baldock and Bournbridge Trust, situate within the parish of Bygrave, in the county of Hertford, and hath prayed us, the said justices, to make such judgment and order in the premises as upon examination shall appear to us meet, and as to law doth appertain. And whereas it hath been duly proved before us, that due notice of such intended information hath been given on the part of the said William Hollick Nash ; and we, the said justices, did proceed to examine at such special sessions the state of the revenues and debts of the said turnpike trust, and to inquire into the state and condition of the repairs of the roads within the same, and also to ascertain the length of the roads, including turnpike roads, within such parish of Bygrave, and how much of such road is turnpike road ; and after such examination, it appearing to us, the said justices, necessary and expedient for the purposes of the said turnpike road, in the said parish of Bygrave, so to do :

“ We do hereby adjudge and order, that the sum of 9*l*. 5*s.*, being a portion of the rate or assessment, levied or to be levied by virtue of the statute passed in the sixth

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year of the reign of his late Majesty King William the Fourth, intituled "An Act to consolidate and amend the laws relating to highways in that part of Great Britain called England," shall be paid by the surveyor or surveyors of the highways of the said parish of Bygrave, on or before the 1st day of August, 1843, to the commissioners of the said turnpike trust, or to Mr. James Piggot, of Royston in the county of Hertford, their treasurer; such sum of 9*l.* 5*s.* to be wholly laid out in the actual repair of such part of the said turnpike road as is within the said parish of Bygrave, from which the same is to be received.

"Given under our hands and seals at the special session aforesaid.

HENRY MORICE, (L.S.)
 JOHN GEORGE FORDHAM, (L.S.)

"To the surveyors of the highways
 of the said parish of Bygrave."

It appeared from the affidavits, on which this rule was moved, that an appeal had been entered at the Michaelmas Quarter Sessions, 1843, against the above order, and was respited from time to time, till the Easter Sessions, 1844, when it was heard, and the order of special sessions confirmed. A rule nisi for a certiorari to remove the order of the quarter sessions "with all things touching the same," had been obtained; and pending its being heard, the present rule was moved for. The rule to remove the order of the quarter sessions was made absolute in Hilary Term last, and on the last day of that Term a motion was made to discharge the present rule, on the ground that it was unnecessary; and the justices would return the order of special sessions, as well as the order confirming it, by virtue of the former rule. It was then conceded, that in that event the present rule must be discharged. Afterwards the return to the certiorari was made, and as in point of fact it did not contain the order of special sessions, the present rule now came on to be heard.

The following were the objections to the order on which the present rule was obtained. 1. That it did not appear that the parish of Bygrave was within the division for which the special sessions were held, and consequently, that the magistrates had jurisdiction. 2. That the order did not state what proportion of the rate was to be paid. 3. That it was left uncertain, out of what rate the sum of 9*l.* 5*s.* was to be paid.

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Wordsworth shewed cause. There are two preliminary objections to the present rule. The first is, that this rule, at the time of its being moved, was unnecessary; as a rule was then pending for a certiorari to remove the order of quarter sessions, "with all things touching the same," which ought to have been sufficient to have disposed of this order; and the justices should not have been harassed with two rules to the same effect. He referred to *Regina v. The Justices of Cornwall* (a). The other is that, if this is to be taken as a separate and independent motion, it is made too late, as more than six months have elapsed since the original order; and it must be considered to be so, as the justices, served with the notice, are the justices by whom the original order was made, and not those by whom it was confirmed on appeal.

With respect to the objection which has been urged against the order, namely, that it does not appear on the face of it, that Bygrave was within the division, for which the special sessions were held, the case of *Regina v. Martin* (b), which was relied on by the other side in moving this rule, does not apply. There the sessions were held under the 5 & 6 Wm. 4, c. 50, which requires the order to be made at a sessions, "to be held within the division in which the said highway may be situate" (c). But the present

(a) 1 Car., Ham. & Allen's
 New Sess. Cases, p. 414.

(b) 2 Q. B. 1037, note (a).

(c) Sect. 94.

portion of the rate the sum ordered amounts to ; for as the act only authorises three rates in the course of a year, of not more than 10*d.* in the pound each, it may be that the sum in gross is more than the rate amounts to. Besides, the act requires that the justices shall inquire into the state of the repairs of the roads, and ascertain their length, and how much of them is turnpike road. It is therefore clear that the word "portion" must mean "proportion." It should also state out of which rate the sum is to be paid, for otherwise it is uncertain, and therefore bad.

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COLERIDGE, J.—As to the two latter objections, it seems to me there is nothing in them. If I am to construe the word "portion" in the act as "proportion," it must be because the necessary implication of the rest of the act requires it. But I do not see that that is so. It is said that the act, in requiring the magistrates to inquire into the length and state of the road, and to ascertain how much of it is turnpike, therefore means that they shall proportion the rate to the length. But that would be a most uncertain and fallacious test, as one mile of the road might require repair, and another mile none ; and it could not be inferred that because one-third of the road required repair, therefore one-third of the rate was the proper sum to be expended. Besides, even had the magistrates awarded an improper sum in proportion to the rate, any objection arising thereon would not have been an objection on the face of the order, but on the merits ; of which this Court could take no cognizance. The objection that it does not specify out of which rate the sum is to be paid, supposes that the three rates allowed by the act of Parliament are co-existent at the same time. But the act does not authorize a second rate till the first is found to be insufficient ; and the rate out of which this sum is to be taken, must be assumed to be the rate existing at the time. Therefore, upon the maxim, *id certum est, quod certum reddi potest*, I think the order in this respect is sufficiently certain. With respect to the objection that

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trates had jurisdiction. It purports to be made at a special sessions for the highways, holden at Royston, in and for the division of the hundred of Odsey, in the county of Hertford; it relates to roads within the parish of Bygrave, and orders a sum to be paid from the highway rate of that parish towards the repair of a turnpike road within it; but it nowhere states Bygrave to be within that division.

The order was made under the 4 & 5 Vict. c. 59, s. 1, and the power to make it is given to "the justices at any special sessions for the highways holden after the passing of this act." These words manifestly point not to a special session to be holden by any two justices convened for the particular occasion, but to the periodical special sessions held by annual appointment under the 5 & 6 Wm. 4, c. 50, s. 45; and it is in accordance with the policy of this statute, and certainly most conducive to a satisfactory exercise of the powers of justices in respect of the highways, to bring all questions of this sort to the decision of periodical meetings of magistrates, when a sufficiently numerous attendance, both of them and of parties concerned, may be reasonably expected.

We are then to refer to this statute. The 45th section enacts, that "the justices of the peace within their respective divisions" must hold "not less than eight, nor more than twelve special sessions in every year for executing the purposes of the act; the days of the holding thereof to be appointed at a special sessions to be held within fourteen days after the 20th of March in every year." (His Lordship here read the rest of the 45th section) (a).

(a) Section 45. "That it shall and may be lawful for the justices of the peace within their respective divisions, or any two or more of them, and they are hereby required, to hold not less than eight nor more than twelve special sessions in every year for executing the purposes of this act, the days of the holding thereof to be appointed at a special sessions to be held within fourteen days after the 20th day of March in every year: Provided always, that it shall not be necessary to cause any notice to be given or sent to any justice acting and residing within such limits of

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These provisions all point to a local limitation of tion; the power is given to justices within their divisions, and the surveyor of each parish within each division is to appear before them, and the return which is compelled to make annually in March, is calculated to inform the magistrates acting for the division, of the state of the highways in his parish, the quantity of repairs made, and the expense incurred; to give them, in short, preliminary general information as must be very necessary for the due exercise of the powers conferred on them by the statute itself, and that of Victoria now in question.

For any act to be done at these periodical sessions, it is clear that the jurisdiction would depend on the fact being within the division; and that fact must of course be stated in the order, or be a matter of necessary implication.

Here it is not stated, nor can it be collected, that Bygrave is within the division in and for which the sessions were holden, at which the order was made.

The rule, therefore, for a return will, on this ground, be made absolute.

Rule absolute

the day or time of the holding thereof; and at the said special sessions held next after the 25th day of March in every year the surveyor of each of the parishes within their respective divisions shall verify his accounts, and shall make a return in writing to such special sessions of the state of all the roads, common highways, bridges, causeways, hedges, ditches, and watercourses appertaining thereto, and of all nuisances and encroachments

made upon the several highways within the parish for which he was surveyor, as well as a statement of the different repairs which the said parish is bound to make, what part thereof has been repaired, and what materials, at what expense, and what was the amount during the time he was surveyor of the said parish."

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WALTHER v. MESS.

(In the full Court.)

A RULE had been obtained to set aside an order of a learned Judge, directing the Master to review his taxation of costs in the above cause. The action was in assumpsit for the wrongful dismissal of the plaintiff; to which the defendant had pleaded various special pleas. At the trial before Lord *Denman*, C. J., a verdict was given for the plaintiff, with 20*l.* damages. The plaintiff did not apply at the time to the learned Judge for a certificate that the cause was a proper one to be tried before him; but did so afterwards, when the learned Judge refused the application. The Master had taxed the plaintiff's costs upon the higher scale.

Where the plaintiff, in an action of assumpsit for unliquidated damages, had recovered a verdict for 20*l.*, and the Master had taxed his costs on the higher scale; the Court set aside an order of a Judge, directing a review of the taxation.

Dasent shewed cause. The rule of Hilary Vacation, 4 Wm. 4, requires that where the plaintiff does not recover more than 20*l.*, his costs shall be taxed on the reduced scale. That rule is not altered by the more recent one of Trinity Term, 7 Vict. (a), except by extending the same provisions to the defendant's costs. It is true that this action being one for unliquidated damages, could not have been tried before the sheriff; but the direction to taxing officers, as remarked by Mr. Baron *Alderson*, in the case of *Wallen v. Smith* (b), "does not confine the reduced scale of allowance to those cases only which are triable before the sheriff, for actions of covenant are expressly mentioned." The plaintiff, to entitle him to the higher scale of costs, should have obtained the Judge's certificate that the cause was a proper one to be tried before him. He referred also to *Cooke v. Hunt* (c), and *Elleman v. Williams* (d).

(a) *Ante*, p. 90.

(c) 5 M. & W. 161; See S. C.

(b) 3 M. & W. 141; See S. C. 7 Dowl. 397.

6 Dowl. 103.

(d) *Ante*, p. 46.

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April, in support of the rule. It is conceded that present being a claim for unliquidated damages, must have been tried before the sheriff: and, indeed, the cases are numerous in the subject: *Jacquart v. Bourne* 1: *Law v. Scoble* 5: *Jaffrey v. Shumbridge* 12: and it is equally true that it has been tried by consent before him, the proceedings would have been valid: *Loverace v. W. Lock* 4. then the plaintiff could not try the case before the sheriff: it would be rather hard to tax his costs for not having done so upon the reduced scale. It is, however, contended: the directions of *Hilary Vacation*, 4 Wm. 4. apply to actions which are not triable before the sheriff: because actions covenant are mentioned. But the whole spirit of the directions, is to discourage the trial of such actions as can be equally well tried before a sheriff or Judge of an inferior Court: and reading them with this view, the words "actions in covenant," must refer, if to anything, to writs of inquiry in covenant. But the case of *Croft v. Miller* 2, shews: the Court does not consider even a writ of inquiry in covenant for unliquidated damages, within the taxing direction. That case is expressly in point, and has never been overruled. It would be trifling with the time of the Court, ask the Judge for a certificate that a case was proper to be tried before him, and not before a sheriff or Judge of inferior Court: when the cause was not one which could be tried before the inferior tribunal.

Lord DEXTER, C. J.—The case of *Croft v. Miller* is in point: and I therefore think, that we must hold that the costs ought not to be taxed upon the reduced scale.

PATTISON, J., WILLIAMS, J., and WIGHTMAN, concurred.

Rule absolute.

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| (a) 5 M. & W. 135; See S. C. non. dir. 7 Dowl. 331. | (d) 11 A. & E. 941; See S. C. 3 P. & D. 536; 3 Dowl. 681. |
| (b) 1 Dowl. 366, N. S. | (e) 3 Bing. N. C. 973; S. C. 5 Scott, 143; 6 Dowl. 1 |
| (c) 9 Dowl. 957. | |

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MACDONALD v. MORTLOCK.

CHADWICKE JONES, Serjt., shewed cause against a rule which had been obtained to discharge the defendant out of custody, on the ground of a variance between the copy and the writ of *capias* on which he had been arrested. The variance complained of was a difference in the defendant's name, it being *Mortlock* in the *capias* itself, and *Mortlake* in the copy. He submitted that the variance was immaterial, and merely a clerical error, which might be amended. [*Coleridge, J.*—The difficulty is, that the Courts have said that they will not amend a copy which is the act of the party himself. Here the sheriff may perhaps be considered as the agent of the party in delivering the copy.] The 32nd rule of Reg. Gen., Hil. Term, 2 Wm. 4, shews that the Court will not favour motions to discharge parties out of custody. The defendant should be left to his action. He does not deny that he is the party intended to be arrested, or that he was about to quit the country. A mere clerical error, unless it alters the sound or sense, is immaterial.

Where the defendant was described in a writ of *capias*, issued under the 1 & 2 Vict. c. 110, s. 3 as "*Mortlock*," and in the copy served upon him as "*Mortlake*;" the Court refused to discharge him out of custody, on the ground of the variance.

Humfrey, in support of the rule. The case of *Smith v. Pennell* (a), shews that the copy delivered must be a true copy. In *Hodgkinson v. Hodykinson* (b), a letter only was omitted; the copy being directed to the sheriff of *Middesex*, instead of *Middlesex*, as in the writ itself; and the Court held the variance fatal. This is not a case where the parties have used the utmost diligence to discover the defendant's true name. He referred also to 1 *Archb. Pract.* p. 510, 7th ed.

COLERIDGE, J.—This really seems to me to be carrying

(a) 2 Dowl. 654.

(b) 1 A. & E. 533; See S. C. 3 N. & M. 564; 2 Dowl. 535.

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the doctrine of variance rather too far. I see a
 — v. *Rennolls* (a), where the difference was between
 affidavit to hold to bail and the writ; in which case
 certainly as much reason for holding the variance
 material, as when it occurs between the writ and the
 There the defendant was called "*Rennol*," instead
 "*Rennolls*," and it was held to be immaterial. There is
 almost less difference in the present case than in the
 The rule will, therefore, be discharged.

Rule discharged

(a) 1 Chit. Rep. 659, n.

MAILE v. BAYS.

To a plea of
 set-off to a bill
 of exchange,
 the plaintiff
 replied as to
 19l. 3s. 2d.,
 a discharge
 under the
 Insolvent Act;
 and that he
 had inserted in
 his schedule
 "a full and
 true description
 according to
 the said act
 in that behalf,
 of the said
 debt or sum of
 19l. 3s. 2d."
 The defendant
 traversed this
 allegation in
 terms. At
 the trial, the
 plaintiff offered
 in evidence a
 schedule, in
 which the
 debt due
 from him to
 the defendant
 was inserted
 as 6l. 10s.;
 but gave no evidence to shew that the debts were the same: *Held*, that this proof
 support the issue.

THIS was an action of assumpsit against the defendant as drawer of a bill of exchange for 7l. 10s., and account stated.

The defendant pleaded as to the first count, a set-off for work and labour, for money paid, and on an account. And, as to the second count, the general issue.

The plaintiff took issue on the last plea; and, except to the sum of 19l. 3s. 2d., parcel, &c., in the first count mentioned, traversed the set-off. And, as to the sum of 19l. 3s. 2d., he pleaded a discharge under the Insolvent Debtors' Act, stating, that after the vesting order had been made, "he, the plaintiff, according to the directions and provisions of the said act, did subscribe and deliver to the said last mentioned Court, such schedule as is required and prescribed by the said act, and containing therein a full and true description of such matters and things as are by that act prescribed and required in that behalf, and also, amongst other things, a full and true description according to the said act of the said debt or sum of 19l. 3s. 2d. so due

owing from the plaintiff as last aforesaid; and also naming the defendant as a creditor for the same; the same being and which was a debt due from the plaintiff to the defendant."

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The defendant rejoined "that the plaintiff did not, pursuant to the said act for abolishing arrest on mesne process in civil actions," &c., "according to the directions and provisions of the said act, subscribe and deliver unto the said Court for the Relief of Insolvent Debtors, such schedule as is prescribed and required by the said act, and containing therein all such matters and things as are by that act prescribed, and, as in the said replication of the said plaintiff alleged, a full and true description, according to the said act in that behalf, of the said debt or sum of 19*l.* 3*s.* 2*d.*, as in and by the said replication of the said plaintiff is alleged to be due and owing from the said plaintiff to the said defendant."

The particulars of set-off were for 19*l.* 3*s.* 2*d.*, for work done as an attorney, and 3*l.* 10*s.* money had and received to the defendant's use (a).

At the trial, which took place before the under-sheriff of Cambridgeshire, the plaintiff produced the schedule of his debts, in which a sum of 6*l.* 10*s.* only was entered as due from him to the defendant; and contended that he had sufficiently proved the answer set up in his replication to the defendant's claim of set-off, and that he was discharged from the debt due to the defendant, notwithstanding the error in the amount. On the part of the defendant it was insisted, that the proof offered did not support the issue, and that the plaintiff must be nonsuited. The under-sheriff left the case to the jury, directing them that the entry in the schedule *primâ facie* discharged the debt of 6*l.* 10*s.*; unless they thought that there was culpable negligence or fraud in making the entry. The jury found a verdict for the plaintiff for 7*l.* 10*s.*

A rule nisi having been obtained in last Michaelmas

(a) No evidence was offered at the trial, in respect of the last item of set-off.

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Term, to set aside the verdict, and to enter a nonsuit, or for a new trial, on the ground of misdirection;

Hunfrey and *Tozer* now shewed cause. There was no leave reserved at the trial to enter a nonsuit. The plaintiff was discharged under the Insolvent Act, as to all the debts enumerated in his schedule; and by the 1 & 2 Vict. c. 110 s. 93, a difference in the amount of any one of them, unless made through culpable negligence or fraud on his part would not affect his discharge. Here there was no proof of culpable negligence or fraud. The creditor must have had notice of the insertion of his debt in the schedule and, if incorrectly stated, should have applied to have it altered. In *Lambert v. Hale* (a), a similar point arose but it was not necessary in that case to decide it.

O'Malley, in support of the rule. The simple question is, whether the insertion of a debt of 6*l.* 10*s.* in an insolvent schedule will discharge him from a debt of 19*l.* 3*s.* 2*d.*; and whether, even if so, the form of the issue in the present case did not confine the plaintiff to the precise sum. In *Lambert v. Hale* there was no proof of the defendant's set-off to a greater amount than the sum inserted in the schedule. In *Tyers v. Stuart* (b) it was held, that a defendant owing two debts to the plaintiff, and inserting one only in his schedule, was not discharged from the other. The words "not exactly" in the 93rd section, merely refer to a miscalculation of figures.

WIGHTMAN, J.—Here an express issue has been tendered and accepted, that the plaintiff did deliver a schedule containing "a full and true description, according to the said act in that behalf, of the said debt or sum of 19*l.* 3*s.* 2*d.*" The proof given was of a debt of 6*l.* 10*s.*, which did not as it appears to me, support this issue. It might, perhaps have been sufficient under the 93rd section, if the debt

(a) 9 C. & P. 506.

(b) 7 Scott, 349.

had been shewn to be the same. But no such evidence was offered, and, as an express issue has been taken, which has not been proved, I think this rule must be made absolute for a new trial.

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Rule absolute for a new trial.

In the matter of the Arbitration between GEORGE MORPHETT, JOHN MORPHETT, and WILLIAM WITHERDEN, Trustees and Executors of, &c.; GEORGE MORPHETT, JOHN MORPHETT, and WILLIAM WITHERDEN, Trustees of, &c.; and ROBERT MORPHETT.

BY a deed of submission, bearing date the 25th day of August, 1842, and made between George Morphett, John Morphett, and William Witherden, Trustees and Executors under the will of George Morphett, deceased, father of the said George Morphett, party thereto, of the first part; and George Morphett, John Morphett, and William Witherden, trustees of the estate and effects of Robert Morphett, one of the sons of the said George Morphett, deceased, of the second part; and the said Robert Morphett, of the third part; after reciting that differences had arisen and were depending between the said George Morphett, John Morphett,

By a deed of submission dated the 25th of August, 1840, between G. M., J. M., and W. W., as trustees and executors of G. M. deceased, &c., and also as trustees, &c., and R. M.; after reciting that disputes had arisen between the parties touching the estate

and effects of G. M., deceased, and touching several other matters and things, the parties referred the same to the award of T. S. and J. J., and such third person as umpire as they should appoint, and agreed to abide by their award touching the premises or "any thing in any wise relating thereto." The arbitrators made an award directing that R. M. should pay a certain sum to G. M., J. M., and W. W., but not stating whether it was payable to them in their character of trustees and executors, &c. or of trustees, &c. They also directed that it should be payable with interest up to a day subsequent to the date of the award; and if not paid by that day, G. M., J. M. and W. W. were authorised to withhold the payment of a certain annuity, by the same award directed to be paid by them to R. M.; until out of the arrears of such annuity, the said sum should be liquidated: *Held*, that the arbitrators had exceeded their authority, and that the award was bad.

On the same day that the deed was executed, the arbitrators indorsed the following memorandum at the foot of it, in the presence of the parties: "Memorandum, that before proceeding with the within-mentioned arbitration, we appoint W. L. to be umpire in case we cannot agree about making our award; and that the said award is to be delivered on or before the 3rd day of November next:" *Held*, that they had no authority to limit the time, as the deed did not do so, so as to vitiate an award made subsequently to the time limited.

One of the parties to the deed had no notice of a meeting of the arbitrators, at which, however, no business was transacted beyond adjourning the meeting. He afterwards attended at a subsequent meeting, and delivered in a protest against the proceedings; but on another and distinct ground, than that of want of notice to attend the former meeting: *Held*, that the want of notice was, under the circumstances, no ground for setting aside the award.

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and William Witherden, as trustees and executors as aforesaid and the said Robert Morphett; and also between the said George Morphett, John Morphett, and William Witherden as trustees as aforesaid, and the said Robert Morphett touching the estate and effects of the said George Morphett deceased, and also touching several other matters and things and that, in order to put an end to the said differences, the said parties had agreed to refer the same to the award and determination of Thomas Smallfield and James Jenner; and that in case the said Thomas Smallfield and James Jenner should take upon themselves such arbitration, but should not agree in making an award, then the said Thomas Smallfield and James Jenner should mutually choose some third person to join with them in determining the said matters in dispute: The said George Morphett, John Morphett, and William Witherden, as trustees and executors as aforesaid, and the said George Morphett, John Morphett, and William Witherden, as trustees as aforesaid and the said Robert Morphett, did, each for himself severally and respectively, and for his several and respective heirs, executors and administrators, covenant and agree, &c., to observe and perform the award and determination of the said Thomas Smallfield and James Jenner, of and concerning the premises aforesaid, or any thing in anywise relating thereto; and also of and concerning all actions, causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, controversies, trespasses, damages, and demands whatsoever, both at law and in equity, at any time theretofore had, made, moved brought, commenced, sued, prosecuted, committed, or depending by or between the said parties, or any of them; and as the said award of the said arbitrators be made in writing under their hands: or in case the said arbitrators should not agree in their award, then to observe and perform the award and determination of the said Thomas Smallfield and James Jenner, and of such third person so to be chosen as aforesaid or any two of them; but so as such last-mentioned award

be made in writing, under the hands of the parties making the same. The deed contained the usual clause for making it a rule of Court. The costs of the arbitration were to be in the discretion of the arbitrators, or any two of them. And, for the full performance of the award so to be made as aforesaid, the said parties bound themselves severally and respectively, their several and respective heirs, executors, and administrators, each to the other of them respectively, in the penal sum of 500*l*.

On the same day that this deed was executed, the following memorandum was indorsed on the deed, and signed by the arbitrators in the presence of the parties: "Memorandum: that before proceeding with the within-mentioned arbitration, we appoint William Lansdell, of Benenden in the county of Kent, farmer, to be umpire, in case we cannot agree about making our award; and that the said award is to be delivered on or before the third day of November next."

It appeared from the affidavit of Thomas Smallfield, one of the arbitrators, in support of the present application, that a meeting was held on the same day that the deed was executed, and that J. Jenner, the other arbitrator, raised a question as to a claim for interest on certain monies alleged to be due from the said Robert Morphett to the said executors and trustees; and that it was on such occasion stated, by all the several parties to the submission, and by all of them admitted, that no claim was intended to be made against the said Robert Morphett, for interest upon any sum or sums which might be found to be due from, or to have been advanced to him; and that the question of interest was not therefore a matter in dispute, or one to which the attention or adjudication of the said arbitrators was required. That a further meeting took place on the 3rd of November, at which Lansdell was present, when Jenner again renewed the question of interest, and that a very partial investigation of this matter took place, because Smallfield refused to enter on that question. Another meeting took place on

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the 10th of April, which was adjourned, as Smallfield did not attend. That a lengthened correspondence took place between the parties, and that Smallfield had had no notice of any meeting for the purpose of considering the award after one which was fixed for the 24th of August, and at which he did not attend. From the affidavit of Robert Morphett, it also appeared that the question of interest was not in dispute, or intended to be referred by the parties to the deed. That he had no notice of, nor attended at any meeting after that of the 3rd of November, 1842, except the one on the 24th of August, 1843, when he delivered in a protest to the following effect: "To Mr. William Lansdell. Sir, I do hereby deny the right or power of Mr. James Jenner as one of the arbitrators in a case of reference between me and the executors of my late father to put or refer to you for your decision any question of matter relating to interest on the account between the said executors and me, and also deny your right or power in any way to decide or give your opinion thereon, as it is not within his or your jurisdiction, the matters relating thereto having long since been agreed on by me and them that no interest should be paid, and the parties acknowledge the same to be true at the time of our signing the submission, and giving power to Messrs. Jenner and Smallfield to be the arbitrators; and I protest against the proceedings. I am, Sir, yours obediently, ROBERT MORPHETT. August 24, 1843." There was no protest, however, on the ground that the time for making the award had elapsed.

It was distinctly denied in the affidavits filed in opposition to this rule, that there was any understanding or agreement that the question of interest, due from Robert Morphett to the trustees and executors, should not be gone into. It was distinctly asserted, that Robert Morphett had notice of all the meetings except that of the 10th of April, 1843, at which, however, nothing was done, and no matter discussed but the question of adjournment.

In consequence of Smallfield's refusal to join in making

the award, Lansdell and Jenner, on the 15th of April, 1844, made the following award :

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After reciting the deed of submission, it continued thus: And whereas we the said Thomas Smallfield and James Jenner, by virtue of the authority given by the said recited indenture, did nominate and appoint the said William Lansdell to act with *them* (a) in the said reference, before *they* (a) proceeded with the same; and whereas the said Thomas Smallfield having acted with us, the said William Lansdell and James Jenner, in the said reference, and having proceeded with the same, did decline to agree with us or either of us, in making an award, and left us to proceed alone to determine the said matters. Now know ye, that we, the said William Lansdell and James Jenner, having taken upon ourselves the charge of the said award, and having heard and considered the several allegations, accounts, vouchers, and proofs brought before us, by and on behalf of the said parties respectively, do find that the said Robert Morphett, on the 10th day of December, 1842, duly passed, allowed, and signed an account relating to the estate and effects of the said George Morphett, deceased, and admitted that the principal sum to which the children of the said Robert Morphett are entitled on his decease, and in respect of which the said trustees and executors are, by the will of the said George Morphett, deceased, proved in the Prerogative Court of Canterbury, on the 10th day of December, 1818, required to pay the interest arising therefrom to the said Robert Morphett, during the term of his life, amounted to the sum of 380*l.* 17*s.* 10*d.* And (subject as hereinafter mentioned), we do award that the said Robert Morphett is entitled to the sum of 304*l.* 13*s.* 4*d.* for sixteen years' interest on the said principal sum of 380*l.* 17*s.* 10*d.*, calculated up to Michaelmas, 1842; and that there is due to the said Robert Morphett the further sum of 130*l.* 4*s.*, as a compensation in the nature of sixteen

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years' interest, also calculated up to Michaelmas, 1842, in respect of the said sum of 304*l.* 13*s.* 4*d.*, which has not been paid to the said Robert Morphett, and that the total sum due to the said Robert Morphett, from the said trustee and executors, up to the period last aforesaid, amounts to 434*l.* 17*s.* 4*d.* And we do award, order, and direct that the said sum of 434*l.* 17*s.* 4*d.*, shall be applied and retained by the said trustees and executors, for the purpose and in the manner hereinafter mentioned. And we do also find that on the 15th day of February, 1823, the said Robert Morphett duly passed, allowed, and signed an account between himself and the said trustees and executors, whereby he acknowledged to be due from him to the said trustees and executors, for money lent and advanced by them to him up to Michaelmas, 1822, the sum of 330*l.* 2*s.* 11*d.* And we do accordingly award such last-mentioned sum to be due from the said Robert Morphett to the said trustee and executors, together with the further sum of 330*l.* 2*s.* 11*d.* for twenty years' interest thereon, calculated up to Michaelmas, 1842, and making together the full sum of 660*l.* 5*s.* 10*d.* And we do further award that there is due from the said Robert Morphett to the said George Morphett, J. Morphett, and William Witherden, in respect of the matter relating to the trust estate and effects of him the said Robert Morphett, the sum of 50*l.* 3*s.* 11½*d.*, and also the further sum of 40*l.* 2*s.* 8*d.*, for sixteen years' interest thereon calculated up to Michaelmas, 1842, and making together the full sum of 90*l.* 6*s.* 7½*d.*, which last-mentioned sum being added to the before-mentioned sum of 660*l.* 5*s.* 10*d.* makes the sum of 750*l.* 12*s.* 5½*d.*. And we do award that the total amount due up to Michaelmas, 1842, from the said Robert Morphett to the said George Morphett, John Morphett, and William Witherden, in their respective characters of trustees and executors, and trustees as aforesaid, is the said sum of 750*l.* 12*s.* 5½*d.* And we do further award, order, and direct that the said sum of 434*l.* 17*s.* 4*d.* hereinbefore awarded to be due to the said Robert Mor

phett, shall be retained by the said George Morphett, John Morphett, and William Witherden, and applied by them in part payment to them of the said sum of 750*l.* 12*s.* 5½*d.*, hereinafter awarded to be due to the said George Morphett, John Morphett, and William Witherden. And, accordingly, we do hereby award, that upon the whole of the said accounts to Michaelmas, 1842, there is a balance in favour of, and to the said George Morphett, John Morphett, and William Witherden, from the said Robert Morphett, amounting to 315*l.* 15*s.* 1½*d.* And we do award, order, and direct, that the said Robert Morphett shall pay the said sum of 315*l.* 15*s.* 1½*d.*, with interest thereon, to be computed from Michaelmas, 1842, to the said George Morphett, John Morphett, and William Witherden, or the survivors or survivor of them, or the executors or administrators of such survivor, on or before the 1st day of June next. And upon such last-mentioned payment being duly made at the time last aforesaid, we do likewise award, order, and direct that the said George Morphett, John Morphett, and William Witherden, shall immediately thereupon pay to the said Robert Morphett, one year's interest, from Michaelmas, 1842, to Michaelmas, 1843, on the before-mentioned sum of 380*l.* 17*s.* 10*d.*, with a further compensation in the nature of interest, upon the amount of such one year's interest, from Michaelmas, 1843, to the time of such payment being made. And we do likewise award, order, and direct that if the said Robert Morphett shall make default in such payment as he is awarded, ordered, and directed to make on the said 1st day of June next, the said George Morphett, John Morphett, and William Witherden, or the survivors or survivor of them, or the executors or administrators of such survivor, shall withhold and retain the amount of the interest payable to the said Robert Morphett in respect of the aforesaid principal sum of 380*l.* 17*s.* 10*d.*, in each and every year, from Michaelmas, 1842, during the life of the said Robert Morphett, until, so far as can be, the said balance of 315*l.* 15*s.* 1½*d.*, with

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interest thereon, from Michaelmas, 1842, to the time of payment or satisfaction shall have been fully paid and satisfied; the said Robert Morphett being also allowed credit for interest upon every such annual payment from Michaelmas last, so to be withheld and retained for the purpose and in manner aforesaid. And we also find there is a balance in the hands of the said trustees and executors forming part of the residuary estate of the said George Morphett, deceased, of 168*l.* 16*s.* 9½*d.*, which, with interest thereon, amounting to 79*l.* 14*s.* 5*d.*, amounts in the whole to 248*l.* 11*s.* 2½*d.*, and is to be applied according to the trusts relating to such residuary estate, contained in the will of the said George Morphett, deceased. It then awarded mutual releases between the parties, "for the said sum of 434*l.* 17*s.* 4*d.*, hereinbefore awarded to be due, and to be retained and applied as aforesaid;" and directed that the costs of the award should be borne by the parties in equal moieties; and that upon performance of this award all differences and disputes in anywise subsisting by and between the said parties, or any of them, previous to the day of the date of the said indenture touching the premises should ultimately cease and determine.

In Trinity Term, 1844, a rule was obtained on behalf of Robert Morphett, to set aside the above award, on the following grounds:

First. That the award was not made within the time limited by the parties for the arbitrators to make their award.

Secondly. That the award embraced matters, namely an award of interest, which the parties agreed not to be a matter in dispute in the arbitration, and which in fact was not a matter in dispute in the arbitration.

Thirdly. That the award is bad in embracing matter beyond the submission, namely, on the arbitrators awarding interest up to Michaelmas 1842, and interest to Michaelmas 1843, being for a period after the submission, and in stating the amount up to Michaelmas 1842.

Fourthly. That Robert Morphett had no notice of the meeting.

Fifthly. That Thomas Smallfield had not notice of the several meetings between the other two arbitrators, Jenner and Lansdell; particularly subsequent to August 1843, and an opportunity of discussing the matters before the arbitrators.

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Bramwell now shewed cause. The rule which has been obtained should have been drawn up on reading the indorsement limiting the time; *In re Smith v. Blake* (a). With respect to the first objection stated in the rule, there was no time limited by the deed of submission within which the award was to be made. The arbitrators might, therefore, make it at any time; *Curtis v. Potts* (b). It was not competent for the parties to control the terms of the deed by a parol agreement. Besides, Robert Morphett, the party on whose behalf the present application is made, attended at a meeting held after the time limited, and delivered a protest on another ground; thereby admitting that the meeting was in other respects valid; *In the matter of Hick* (c). The objection, indeed, is incorrectly worded. The time was not limited by the parties, but by the arbitrators. The second ground of objection is stated too generally. It may be meant that the question of interest is not included in the terms of the deed; but a reference to that document will shew that the words there used are sufficiently large to include it. Or it may be intended to impugn the discretion of the arbitrators, and then the Court will not entertain the objection. The objection is, however, fully answered by our affidavits. With respect to the third objection, the parties were trustees under a will, and the matter in dispute was concerning a certain annuity, and whether any thing had occurred to prevent that annuity being payable in future; and the arbitrators had

(a) 8 Dowl. 130.

(b) 3 M. & S. 145.

(c) 8 Taunt. 694.

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power therefore to award concerning the future of it; and the parties had bound themselves by the submission to observe and perform their obligations of and concerning the premises aforesaid, "or any other thing in anywise relating thereto." The fourth objection was answered by our affidavits, which shew that Robert M had notice of every meeting except that of the 10th of April, 1843; and no business was transacted at that meeting but that of adjournment. Besides, the objection was waived by his attendance on the 24th of August, 1843, protesting on another and different ground. With respect to the last objection, Smallfield declined to attend the meetings, of all of which he had regular notice.

W. H. Watson, in support of the rule. It is necessary to notice the limitation of time in the award, if it had been by parol, it clearly could not have been valid. [*Coleridge, J.*—That brings it to the question whether the parties could limit the terms of a submission by a parol or any agreement of a less formal character.] The parties here acquiesced in the arrangement, as may be inferred from their silence at the time, and their subsequent attending such of the meetings as were held within the time limited. The award is, however, clearly valid in awarding interest up to a date subsequent to that of the award. The arbitrators had no right to award expenses regarded existing disputes. The question of interest ought to be payable to one party or the other after the date of the submission, was clearly not an objection, but a prospective difference. Regular notice of the meetings should have been given to the parties. It would have been material to oppose the question of adjournment which was entertained at the meeting of the 10th of April, 1843. It is not asserted that Smallfield had any notice of the meeting at which the award was signed, and it may be taken that there was a meeting for that purpose. [*Coleridge, J.*—That ground of objection is not stated

rule.] It is stated in the last ground of objection that he had no "opportunity of discussing the matters before the arbitrators."

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COLERIDGE, J.—As to the first and fourth grounds of objection, I see no reason for setting aside this award. Whether Robert Morphett had notice of the meeting on the 10th of April, 1843, or not, is perhaps immaterial; for nothing was done at that meeting beyond adjourning the inquiry into the matters to a future day. I should not be inclined to accede to this objection, even if the party had protested expressly on this ground; but when we find that he attended at a subsequent meeting on the 24th of August, and handed in a protest on a totally different ground, I think he must be taken to have waived the objection. With respect to the objection that the award is beyond the time limited by the parties, the answer is that no time was limited by the parties in the deed. It appears that, at the first meeting that was held, the two arbitrators agreed to appoint a third arbitrator, and that he was accordingly appointed, and took his authority under the deed of submission. If that be so, the two arbitrators had no authority without his concurrence to limit a time, so as to render an award made after that time invalid. But independently of this, I think that even the three together could not, in the absence of some power so to do, limit the time for making their award. It is said, however, that the parties to the deed have by their silence acquiesced in this arrangement. But the answer is that their intentions are expressed by the deed, which limits no time, and that the deed cannot be altered by a parol agreement. It is clear that this was a mere arrangement by the arbitrators amongst themselves as to the time of making their award, and was not intended to limit their authority. Certainly no point would have been made of it, if other objections had not arisen.

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With respect to the other grounds of objection, I will take time to consider them.

Cur. adv. vult.

COLERIDGE, J.—This was a rule for setting aside an award. Some of the grounds on which it was moved, disposed of when argued; it will only be necessary for me to consider one of those which remain, because I have been unable to overcome the difficulty which it presents to the court in sustaining the award.

The rule states it thus: "the award is bad in embracing matters beyond the submission, viz., in the arbitrators awarding interest up to Michaelmas, 1842, and interest from Michaelmas, 1843, being for a period after the submission and in stating the amount to Michaelmas, 1842."

The submission is dated in August, 1842, and is of existing differences, and "anything in anywise relating thereto." These last words were relied on, as extending the power of the arbitrators to matters arising after the submission; but they clearly have no such effect, and matters relating to the existing differences must themselves exist at the same time with the existing differences.

The objection is very weakly stated in the rule. It would seem to be a very slight excess, if any, to calculate the accounts between the parties to the next quarter day beyond the submission; and to direct the payment of the interest on the principal so calculated, on the Michaelmas of that and the following year, would seem to be no excess, or, at all events, one that might be rejected without prejudice to the rest of the award. But in order to understand the force of the objection, the circumstances must be stated, and then the scheme of the award considered, from which it will appear that the arbitrators have misunderstood entirely, and therefore exceeded the limits of their power.

Robert Morphett, the party applying, is the son of Geo. Morphett, deceased, of whose will the three persons, [

ties on the other side are executors and trustees. Robert Morphett appears to have become embarrassed, and the same three persons are the trustees of his affairs under some deed. Under the father's will, a sum of money was bequeathed to the trustees, the interest of which was to be annually paid to Robert Morphett, for his life, the principal to go to his children on his death. This sum appears to have been agreed to amount to 380*l*. 17*s*. 10*d*.; it further appears, that many years ago the trustees and executors advanced to him, out of the testator's estates, the sum of 330*l*.; no interest appears to have been paid to him for sixteen years before the submission, nor any by him for twenty years.

This account was the first subject of difference between the parties—collateral to this was a difference respecting a sum many years since advanced to him by the trustees, of 50*l*. 3*s*. 11½*d*., on which no interest had been paid for sixteen years, nor is it said out of what fund it was advanced, but I presume out of that which his own effects had created.

These are the facts found by the arbitrators in their award, and, under the terms of the submission, the utmost limit of their power would be to ascertain the respective principal sums due from Robert Morphett, and whether they were to carry any and what interest, and from what period; to ascertain the principal sum to the interest of which he was entitled; for how many years his claim to that interest was to be carried back, and at what rate; and whether he was entitled to consider each year's interest withheld as a principal loan, bearing interest, to be set-off against that which he was to pay. Having ascertained all these particulars up to the date of the submission, their duty would have been to direct the payment by him of the balance forthwith, or at a future time or times.

This would have made a final end, as far as in them lay, of the differences referred; but the arbitrators appear to have considered that they had a right to deal with all these

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respective accounts without reference to the date of the submission, and to regulate the future dealings of the parties with regard to them, as if those had been expressly placed within their power. The consequence has been that the award having ascertained balances due from Robert Morphett, on both accounts, down to Michaelmas, 1842, consolidates them into one sum, directs that on that Michaelmas day and the following, interest shall be paid upon it, without distinguishing between the two characters in which the same persons were entitled to it, nor the funds to which it was properly to be referred. It further directs, that this consolidated sum shall be paid on the 1st of June, 1844, and then makes the payment by the executors of the interest on the legacy to Robert Morphett, indefinitely, during his whole life, dependent, first, on his paying the specified interest at Michaelmas, 1842, and 1843, and, secondly, on his paying off the principal consolidated sum on the 1st of June, 1844. No provision is made for dividing this sum between the two funds to which it belongs, nor any for the payment of interest after Michaelmas, 1843, if it remains unpaid after June, 1844.

It is quite obvious that this complicated, and yet imperfect arrangement, made to commence from a period beyond the submission, and carried on, it may be, through the whole life of one of the parties, and with regard to the others, extending to survivors, and the executors of the survivor, is beyond the powers conferred by the submission. My doubt has been, whether the objection has been properly stated in the rule—imperfectly it certainly has been—but the stating the amount at a period beyond the submission, is, in itself, an excess, which forms a part of the whole, a part which I am unable to separate from it—the same may be said of the award of the interest, made up as that is of a sum improperly consolidated from two sources.

I am of opinion, therefore, that this objection must prevail, and the rule will be absolute.

Rule absolute.

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SIMONS v. LLOYD.

(In the full Court.)

THIS was an action of assumpsit for work and labour, and money paid, and on an account stated. To which the defendant had pleaded that the action was for work and labour as an attorney, and that no signed bill had been delivered pursuant to the statute. The plaintiff replied *de injuriâ*, to which the defendant demurred, and the plaintiff joined in demurrer.

To an action for work and labour, &c., the defendant pleaded that the action was for work and labour as an attorney, and that no signed bill had been delivered pursuant to the statute: *Held*, on demurrer, that the replication *de injuriâ* was improper.

E. V. Williams, in support of the demurrer. This form of replication is improper in the present case. The law respecting this form of replication recently underwent discussion in the Court of Exchequer Chamber, in the case of *Salter v. Purchell* (a), and is now clearly settled. The replication is only proper when the plea contains matter in excuse or justification; and not even then, if it assert license or authority from the plaintiff, or an interest in land, or involve the trial of a matter of record. In the present case, the plea is in absolute bar and extinguishment of the right of action, as it existed at the time of commencing the suit. The statute prevents an attorney from bringing any action on his bill, until at the expiration of one month after delivering a copy of it to the party to be charged. The plaintiff, therefore, had no right of action at the time of this suit, if the subject-matter of the plea be true. Besides the informality, it is difficult to see what advantage the plaintiff proposes by this form of replication. He should have traversed the non-delivery of a bill.

(a) 1 Q. B. 209; See S. C. 1 G. & D. 693.

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J. Pollock, contra. The plea is not in absolute extinguishment of the right of action. The plaintiff may deliver a bill and commence a fresh action; which shews that the plea is only matter of excuse for not performing the promise alleged in the declaration. He cited *Basan v. Arnold* (a)

Lord DENMAN, C. J.—You cannot call this an excuse for breaking the defendant's promise. It rather shews that the plaintiff had never any right to sue.

PER CURIAM.

Judgment for Defendant.

(a) 6 M. & W. 559; See S. C. 8 Dowl. 356.

WALKER and Co. v. PARKINS.

A writ of summons commanded the defendant to enter an appearance "at the suit of Henry Walker & Co.;" and that in default, &c., "the said Henry Walker & Co. may cause an appearance to be entered for you." It was indorsed "the plaintiff claims," &c. : *Held*, that the writ was regular, as the Court could not judicially take cognizance that

THIS was a rule to set aside a Judge's order, which had been made a rule of Court, under the following circumstances.

It appeared on the affidavits that the action was brought on a bill of exchange, drawn by the defendant, in favour of "Henry Walker and Co.," who, in truth, was but one person, the plaintiff in the present action. That a writ of summons had been issued, commanding the defendant to cause an appearance to be entered for him in this Court "at the suit of Henry Walker and Co.," with a notice that in default thereof, "the said Henry Walker and Co. would cause an appearance to be entered for him, and proceed to judgment. It was indorsed "the plaintiff claims," &c. The defendant was personally served with this writ on the 4th of April; and on the 8th, he took out

"Walker & Co." was not the name which the plaintiff bore.

Where an order of a Judge to set aside a writ of summons served on the 4th of April, was made a rule of Court on the 15th of April, the first day of Term, and on the same day a notice was served on the defendant's attorney, that the plaintiff intended to apply to the Court to rescind the Judge's order, as soon as counsel could be heard, and, accordingly, a rule nisi was moved for and obtained on the 23rd : *Held*, that the application was sufficiently in time.

summons, returnable before a learned Judge at Chambers, to set aside the writ of summons, or copy and service thereof, for irregularity, on the ground "that the plaintiffs' names should be fully set out in the proceedings, and not given as 'Walker and Co.'" This summons was heard on the 11th of April, when the learned Judge, after hearing counsel on both sides, made an order accordingly, to set aside the writ of summons, with costs. On the same day, the defendant obtained an appointment to tax the costs under the order, and served a copy of the order and appointment to tax on the plaintiff's attorney. On the 12th of April, the defendant taxed his costs, and on the 14th served the allocatur on the plaintiff's attorney, and demanded the amount. On the 15th of April, being the first day of the present Term, he made the Judge's order a rule of Court, and obtained an appointment to tax the costs, for the 18th of April. On the same day, (the 15th of April), and, as the defendant's attorney deposed in his affidavit, after he had caused a copy of the rule of Court, and appointment to tax thereon, to be served on the plaintiff's attorney, he was served with the following notice: "In the Queen's Bench. Between Henry Walker and Co., plaintiff, and Thomas C. Parkins, defendant. Take notice, that this Honourable Court will be moved to-morrow, or so soon as counsel can be heard, for a rule to discharge the order of the Hon. Mr. Baron *Rolfe*, dated the 11th instant, as well as any subsequent rule of Court made in this cause, and having reference to the said order. Dated this 15th day of April, 1845. Yours, &c. Robert Marriott, 7, New Inn, Strand, plaintiff's attorney. To Mr. R. Hare, defendant's attorney or agent, 5, South Square, Gray's Inn." The defendant's attorney, notwithstanding, proceeded to tax his costs upon the 18th of April. On the same day he was served with this further notice. "In the Queen's Bench. Between Henry Walker and Co., plaintiff, and Thomas C. Parkins, defendant. Take notice that this cause was mentioned to the Court this day, and the further hearing postponed till to-morrow, the 19th April, instant. I therefore give

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you notice not to proceed upon the rule of Court, served by you on me, and dated the 15th April instant. Yours, &c., Robert Marriott, 7 New Inn, Strand, April 18th, 1845. To Mr. Hare, defendant's attorney or agent." On the 23rd of April he issued execution, and on the same day, being as soon as counsel could be heard,

Lush obtained the present rule.

Pigott shewed cause, and argued that the application was not in sufficient time. The plaintiff had allowed the defendant to take a step, and incur expense since the order was made. The mere notice that the party intended to set aside the process, is not sufficient. The defendant should have obtained his rule earlier in the Term. By omitting to do so, he has led the plaintiff to suppose that the order would be acquiesced in, and has thus waived his right to impeach the order. But further, the order at Chambers is correct, and the objection to the writ is not a misnomer merely, which can be set right in the declaration. The term "and Co." added to a person's name, signifies "and Company." Every one would so understand it, and the defendant so reads it; he has then a right to know who are the parties that constitute the company. They should all be named, as is evident from the words, "at the suit of A. B." given in Schedule of Forms, No. 1, to the Uniformity of Process Act, 2 Wm. 4, c. 39. The Courts require parties to keep strictly to those forms; *Smith v. Crump* (a), *Stevenson v. Thorn* (b).

Lush, in support of the rule. This is a mere misnomer which cannot prejudice the defendant. Formerly it might have been the subject of a plea in abatement; *Sarjant v. Gordon* (c); *Jowett v. Charnock* (d); *Morley v. Law* (e);

(a) 1 Dowl. 519.

(d) 6 M. & S. 45.

(b) *Ante*, p. 230; See S. C.
13 M. & W. 149.

(e) 2 B. & B. 34; See S. C.
4 Moore, 369.

(c) 7 D. & R. 258.

Sumner v. Batson (a); *Mayor of Stafford v. Bolton* (b); but now the defendant can only take advantage of it, if it be carried into the declaration, by applying to have it set right at the plaintiff's expense, on summons. The question arises as on demurrer to the writ, and upon authority it would be good. *Scott v. Soans* (c), is a conclusive authority on the subject. There the name was "Jonathan otherwise John," and the Court said non constat, but that it was all one Christian name. The application to rescind the order is in time. Notice was given to defendant on the first day of Term, that the Court would be moved, and he should not have taken this step with such haste; at least he cannot complain of the plaintiff, who could not move the Court earlier.

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Cur. adv. vult.

COLERIDGE, J.—This was a rule to rescind an order made by my Brother *Rolfe*, setting aside a writ of summons with costs; and it appears to me, upon explanation of the circumstances, that the application is made in sufficient time. The objection to the writ is, that the plaintiff is named in the writ, "Walker and Co.," whom the indorsements on the writ speak of in the singular number as one person.

The principle appears to be this; if the fault be merely that the plaintiff is mis-named in the writ, that is no objection in this stage; for the statute of 3 & 4 Wm. 4, c. 42, s. 11, has taken away the plea in abatement for misnomer, and given a new and specific remedy, when the fault is carried on into the declaration, by compelling an amendment then at the plaintiff's expense; but if the name on the face of the writ is naught, or uncertain, then the writ is bad; as if in the present case, it had appeared by the indorsement that there were more plaintiffs than one, it might have been reasonably contended that "Walker and Co." was

(a) 11 Moore, 39.

(b) 1 B. & P. 40.

(c) 3 East, 111.

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uncertain; one partner might have been named "Walker" but whether "Co." meant the other, or others, no one could tell.

But in itself I cannot judicially say that "Walker & Co." may not be the name which the plaintiff bears. *Lush* cited the case of *Scott v. Soans* (a), where a defendant sued by the name of "Jonathan otherwise John Soans" demurred, as being described as having two Christian names and because it was left uncertain which was his Christian name; but the demurrer was overruled. "I constat," said Lord Ellenborough, "but that 'Jonathan otherwise John,' is all one Christian name;" and the distinction was there taken between a plea in abatement which the fact would be disclosed, and a demurrer, where the fault, if available as an objection, must appear on the face of the pleading.

I think we are at present as on demurrer; certainly not as on a plea in abatement, which is taken away. The result will, therefore, be absolute.

Rule absolute.

(a) 3 East, 111.

DOE dem. POTTS v. JINDERS.

Where an order to refer an attorney's bill to taxation, had been obtained before the passing of the 6 & 7 Vict. c. 73, and the Master's allocatur had since been made, by which he taxed off less than a sixth of the bill: *Held*,

that the case came within the exceptive clause in the statute, and that the Court had power to make an order on the client to pay the costs of the taxation.

A JUDGE'S order had been obtained in March, 1845, on behalf of Mrs. Potts, the lessor of the plaintiff in the above action, to refer certain bills of costs to the Master to be taxed. The Master's allocatur was dated in January 1845, and directed that from the original bills of 427*l.* 0*s.* a sum of 69*l.* 3*s.* 10*d.* should be struck off. The original claim of the attorney was for 417*l.* 0*s.* 4*d.*; but two bills amounting to 10*l.* had been afterwards claimed, and allowed by the Master. The balance due to the attorney

on the whole accounts was 34*l.* 14*s.* 3*d.* Mrs. Potts had declined to take up the Master's allocatur, and the attorney had therefore done so; and as the sum taxed off his bill was under a sixth, the present rule had been obtained on his behalf, calling on Mrs. Potts to shew cause why she should not pay the costs of the taxation.

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Bramwell shewed cause. The order to refer to taxation was obtained before the passing of the 6 & 7 Vict. c. 73. It was made under the old act which is repealed by the 6 & 7 Vict. c. 73: and therefore unless it comes within the exceptive clause in that statute, all power to make any order with respect to it is taken away from the Court. It is submitted that it does not come within the exceptive clause of the statute, which is as follows: "save and except so far as relates to any matters or things done at any time before the passing of this act, all which matters or things shall be and remain good, valid, and effectual, to all intents and purposes whatsoever, as if this act had not passed." This is not a "matter or thing" done before the passing of the act, but something which is sought to be done since the passing of the act. For the other side to maintain that this is a thing done before the passing of the act, they should show that the order to refer being once obtained, the party could not abandon it; and that the necessary legal result of the Master's allocatur was the present order for payment by Mrs. Potts of the costs of taxation: whereas, although less than a sixth be taxed off, it is still in the discretion of the Court to order the attorney to pay the costs; *Baker v. Mills* (a); *Ehwood v. Pearce* (b). Those cases are also an authority for refusing this rule, even had the Court the power to make it; as the sum taxed off so nearly reaches a sixth.

(a) 8 Bing. 83; See S. C. 1 M. & Scott, 159; 1 Dowl. 251.

(b) 2 Dowl. 382; See S. C. 2 Cr. & M. 415.

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Jervis, in support of the rule. If the Court is to hold that where an order to tax has been obtained before the late act, the taxation since that act is without authority, great confusion would inevitably ensue. If, on the other hand, the allocatur remains good, and can be enforced, the almost invariable practice has been, where less than a sixth has been taxed off, to give the attorney the costs of the taxation. He referred to *Morris v. Parkinson* (a), and *Baker v. Mills* (b).

Cur. adv. vult.

COLERIDGE, J.—In this case although the bill be somewhat large, and the amount deducted approaches nearly to one-sixth, yet there are circumstances disclosed in the affidavits which make me think the taxation strict, and the deductions attributable rather to difficulty of proof, than to excess or unfairness in the charges. If therefore, I have any discretion in the matter, I should allow the costs of the taxation to the attorney. It is said that I have not, for that the case is within the general repealing words of the first section of 6 & 7 Vict. c. 73, and not within the saving words.

The saving words are—"save and except so far as relates to any matters or things done at any time before the passing of this act, all which matters and things shall be and remain good, valid, and effectual, to all intents and purposes whatsoever, as if this act had not passed."

Here the order for taxation was made before the passing of the act—the taxation was not completed till after. For the rule it is argued that the words are satisfied by the order being a thing done before the passing of the act; against it, it is urged that the "taxation" is the thing done, and that that, not being completed, was not done till after the passing.

It is not, indeed, conclusive, and yet not immaterial

(a) 3 Dowl. 744; See S. C. 2 C., M. & R. 178.

(b) 2 Dowl. 382; See S. C. 2 Cr. & M. 415.

to observe, that the 37th section of the new act, which alters the law, is entirely prospective; and if the argument against the rule be correct, it will go to this extent that no power to continue any taxation ordered before the act passed, existed afterwards—the power of the officer to tax ceased, as well as of the Court to award costs—no perjury could be assigned on any affidavit of increased costs.

These consequences, and such as these, are not to be permitted, unless the words which involve them are unambiguous. In my opinion, the words here are not so; the saving clause divides itself into two parts, and the latter must be understood at least as co-extensive with the former. Taking them together, I think the validity of the Judge's order may be considered as saved by the latter; and by the former, so much of the statute of George the Second as relates to it.

Rule absolute (a).

(a) See *Hodge v. Bird*, ante, vol. 1, p. 956; *Binns and Others v. Hey*, id. p. 661.

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EVANS and Another v. COLLINS and Another.

AN action on the case had been brought by the plaintiffs, who were sheriff of Middlesex, against the defendants for falsely representing that a certain party of the name of John Wright, was the John Wright against whom the plaintiffs had a writ; whereby the plaintiffs were induced to arrest him, and were afterwards obliged to pay 10*l.* in an action of damages for that arrest. The defendants had pleaded, first, not guilty; secondly, a denial of damages; thirdly, that defendants had reason to believe, and did believe, that the two John Wrights were the same person; and fourthly, that the plaintiffs had stated to the defendants circumstances which induced them to believe that the two John Wrights were the same person, and

A rule nisi was obtained for entering up judgment non obstante veredicto, on one of several pleas, which was made absolute on argument by this Court. A Court of error afterwards reversed the judgment non obstante veredicto: *Held*, that the defendant was entitled to the costs of opposing the rule.

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that they did *bonâ fide* believe so. Upon these pleas, issues were joined: and at the trial before Mr. Justice Wightman, on the 16th of May, 1842, a verdict was returned for the plaintiffs on the issues joined on the 1st, 2nd, and 4th pleas, with one shilling damages; and for the defendants on the issue on the third plea: with liberty to the plaintiffs to move to increase the damages to 10*l.*, and to enter judgment *non obstante veredicto* on the third plea; and with liberty to the defendants to move for a nonsuit.

Cross rules having accordingly been obtained in Trinity Term, 1842, the Court, on argument, made the plaintiffs' rule absolute for increasing the damages, and for entering up judgment *non obstante veredicto*, and discharged the defendants' rule; but no mention was then made respecting the costs of these rules (*a*).

The defendants then brought a writ of error on the judgment of this Court, as entered up pursuant to the above rule; and the Court of Exchequer Chamber, on argument, reversed the judgment of this Court (*b*).

On the subsequent taxation of the costs, it appeared that the Master had refused to allow the defendants the costs of opposing the plaintiffs' rule, on the ground that as the judgment of this Court in granting the rule was pronounced to be erroneous by the Court of Exchequer Chamber, and as the rule itself made no mention of costs, neither party was entitled to them. It was admitted that the Master's taxation, in other respects, was correct; he having allowed the defendants the general costs of the cause, as having succeeded on the third plea, which went to the whole cause of action; and having given the plaintiffs the costs on those issues which were undisturbed by the decision of the Court of Queen's Bench.

A rule *nisi* having been obtained (*c*), calling on the plaintiffs to shew cause why the Master should not review

(*a*) 5 Q. B. 804; See S. C.
 1 D. & M. 72.

(*b*) 5 Q. B. 820.

(*c*) In Easter Term, 1844.

his taxation of the defendants' costs; on the ground that he should have allowed the defendants the costs of opposing the plaintiffs' rule.

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Humfrey now shewed cause. By Reg. Gen., 2 Wm. 4, r. 74, "no costs shall be allowed to a plaintiff upon any counts or issues upon which he has not succeeded, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." And by r. 64, "if a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second." It is clear, therefore, that the defendants are not entitled to the costs of the rule which the plaintiffs obtained for increasing the damages and entering up judgment non obstante veredicto; for they did not succeed on this rule. If either party be entitled, it is the plaintiffs. It may be urged that the Court of Error by reversing the judgment of this Court in that respect, has entitled the defendants to these costs; but the case of *De Rutzen v. Lloyd (a)*, shews that, in point of fact, where the costs are incurred through the erroneous judgment of the Court, as in the case of a new trial on the ground of admission of improper evidence, neither party is entitled to them. The case of *Jolliffe v. Mundy (b)* decides that where a first trial is abortive, and a new trial is ordered, neither party is entitled to the costs of the first trial. If, indeed, the defendants could be said to be entitled to these costs, it could only be by virtue of the judgment of the Court of Error; and if so, the application for costs should be made to that Court, and not to this Court which has decided against the defendants. He cited also, *Bower v. Hill (c)*.

(a) 5 A. & E. 463; See S. C. 7 Dowl. 225.
 2 N. & P. 213. (c) 5 Dowl. 183; See S. C.
 (b) 4 M. & W. 502; See S. C. 2 Scott, 535; 2 Bing. N. C. 339.

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Peacock, in support of the rule. The rule of Hilary Term, 2 Wm. 4, r. 74, has no application to the present case. And the analogy sought to be deduced from Reg. Gen. Hilary Term, 2 Wm. 4, r. 64, is not borne out; for where the Court grants a new trial, they do not decide the point in question, but send it down again for trial; whereas in the present case, the Court of Error gives judgment upon the very point itself. The proper rule is, that wherever the superior Court reverses a judgment in the Court below, the party in whose favour the reversal proceeds, is entitled to stand in the same position as if the Court below had pronounced the right judgment; *Gildart v. Gladstone* (a). The case of *Adams v. Meredew* (b) is, however, a direct authority in favour of this application. There the plaintiff having obtained a verdict, and the Court of Exchequer having arrested the judgment, which judgment was reversed by the Court of Exchequer Chamber; it was held, that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the Court of Exchequer.

COLERIDGE, J.—I confess that it seems to me to be impossible to distinguish this case from the one which has been cited of *Adams v. Meredew* (b). The cases seem to be identical in principle; the only difference being, that here the plaintiff has obtained judgment non obstante veredicto which has afterwards been reversed; and in the case cited, the defendant had obtained an arrest of judgment, which was also reversed on error. The Court there decided that the plaintiff was entitled to the costs of the rule in arrest of the judgment; and I think I must also decide in the present case, that the defendants were entitled to the costs of the rule for judgment, non obstante veredicto. The defendants were entitled to the general costs of the defence in the Court below; and had they

(a) 12 East, 668.

(b) 3 Y. & J. 419.

succeeded, as by the subsequent decision of the Court of Error they were entitled to do, in opposing the rule, they would have been entitled to the costs of it. I therefore think they are entitled to these costs, equally as if the judgment of the Court below had been in their favour.

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Rule absolute.

DOE on the demise of the Right Honourable GEORGE
 Earl of EGREMONT v. MARY STEPHENS.

A RULE had been obtained in last Hilary Term, calling on the lessor of the plaintiff to shew cause why the verdict obtained in this cause should not be set aside, and a nonsuit entered instead thereof, and for a stay of proceedings in the meantime. It appeared, upon the affidavits in support of this rule, that the defendant having entered into the consent rule, and been admitted to defend as landlady of the premises sought to be recovered, the cause had been taken down to trial at the Spring Assizes, 1844, for the county of Somerset, when a verdict was found for the plaintiff, subject to a special case. An arrangement was then made by the attorneys for the respective parties for putting an end to the litigation, upon certain terms, a part of which terms was, that the lessor of the plaintiff should be at liberty to sign final judgment, and tax his costs, and that these should be paid by the defendant. Judgment was accordingly signed, and the costs taxed in July, 1844; but it being afterwards discovered that the attorneys had misunderstood each other, it was arranged that the parties should be restored to their original position. This was accordingly effected by a Judge's order, discharging the judgment in December, 1844. On the 14th of January, 1845, a draft special case was submitted by the attorneys

Where on the trial of an action of ejectment a verdict was taken, subject to a special case, and before the terms of it were settled, the lessor of the plaintiff died: *Held*, that this formed no ground for an application for setting aside the verdict, or staying proceedings in the action; but that the Court would compel the plaintiff to find security for costs.

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for the lessor of the plaintiff, to the defendant's attorney ; but he having made some alterations to which the other side declined to accede, the matter stood over. In the meantime, on the 2nd of April, the lessor of the plaintiff died, and the present rule was obtained.

Montagu Smith shewed cause. It is submitted, that this rule must be discharged. The utmost that the defendant can ask is, that the plaintiff should give security for costs. In *Thrustout d. Turner v. Grey and Others* (a), it appeared upon a special verdict in ejectment, that the lessor of the plaintiff claimed as tenant for life, and, upon an affidavit of his death, it was moved that all proceedings might be stayed, since it could signify nothing to argue it upon the merits ; but the Court held, that though the possession could not be obtained, yet the plaintiff had a right to proceed for damages and costs ; and that all they could do, was to oblige him to give security for costs, as in the case of infant lessors, who could not enter into the consent rule. Here it does not appear that the lessor of the plaintiff was only tenant for life ; so that there is no reason why possession could not be given. The writ of *habere facias possessionem* would issue in the name of John Doe. In *Doe d. Cozens v. Cozens* (b), where, after a verdict for the defendant in ejectment, a rule nisi for a new trial had been obtained, and afterwards, and before cause shewn, the lessor of the plaintiff died, and the rule was supported by a party professing to represent the interest of the late lessor ; it was never attempted to contend that the action abated. The only doubt there suggested, was, whether in the event of the rule being made absolute, the Court would impose the condition that the defendant should have security for costs. The only difference in the position of the parties, which the death of the lessor creates, is with

(a) 2 Stra. 1056.

(b) 1 Q. B. 426 ; See S. C. 9 Dowl. 1040.

regard to costs; *Goodright v. Holton* (a); *Thrustout v. Bedwell* (b); *Doe d. Payne v. Grundy* (c). There is a further point, perhaps, of how far the present case is within the 17 Car. 2, c. 8. [He was stopped by the Court, who called on]

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Cowling to support the rule. Taking this as the case of an ordinary action, it is plain that it would have abated. All the cases on the subject are collected in a note to the case of *Underhill v. Devereux* (d). But the difficulty here is, that there being a nominal plaintiff on the record, some doubt is cast, whether, in the event of further proceedings being taken, the continuance of the action could be made the ground of a writ of error. It is clear, however, that the verdict ought not to be allowed to stand; for that was taken subject to a special case, and as by the death of the lessor of the plaintiff, the terms of the special case cannot now be settled, and the arrangement falls to the ground, the verdict which was taken contingently on it, should be expunged from the record, and a nonsuit entered instead. The only question to be tried in this form of action, is, whether the lessor of the plaintiff is entitled to possession of the premises. If he die, the action ought to cease; for it may be, he was only tenant for life, and then it is the party in remainder, and not his executor who is entitled to possession. In a note to the case of *Underhill v. Devereux* (e), the rule is thus stated: "If the lessor of the plaintiff in ejectment dies after issue joined, and before trial, or even after trial, and before payment of costs, the defendant cannot recover his costs against the lessor's executor or administrator; for the consent rule was merely personal to make the party liable to an attachment, if he refused to pay the costs;" and various authorities are there cited. It would be unjust to the defendant, that he should be bound

(a) Barnes, 119.

2 D. & R. 437.

(b) 2 Wils. 7.

(d) 2 Saund. 72, n, 6th ed.

(c) 1 B. & C. 284; See S. C.

(e) Id. p. 72, n, note (n).

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by the terms of the consent rule, when there is no longer a lessor of the plaintiff to whom he can look for costs. In *Thrustout d. Turner v. Grey and Others (a)*, the death of the lessor of the plaintiff took place after the special case stated, and there the Court considered the party ought not to be prejudiced by what might be taken to be the delay of the Court. The same remark applies to *Doe d. Cozens v. Cozens (b)*. Those cases in which the Court grants security for costs, are where the parties are seeking a favour, as in the case of assignees continuing a suit by the bankrupt. The present is a question of right. The case of *Goodright v. Holton (c)*, is not against the view submitted. It may, perhaps, be inferred from the report in that case, that the costs were taxed. He cited also *Doe d. Taylor v. Crisp (d)*.

COLERIDGE, J.—I should be very unwilling to dispose of this rule on a mere matter of form. Mr. Cowling, however, has had some difficulty in contending that this action is at an end; and yet that, for certain purposes, it cannot be held to be abated.

One of two things is clear, either it has abated by the death of the lessor of the plaintiff, and then the present rule would be unnecessary; or it has not, but some circumstance has occurred to render the interference of the Court necessary, in order to maintain those principles of equity, upon which the action of ejectment is peculiarly based. Now the ground suggested for the interference of the Court, is the death of the lessor of the plaintiff. If, therefore, the Court is to interfere, it must interfere to put the defendant in the same position as before the lessor of the plaintiff died. The whole proceeding is founded, it is said, upon contract between the parties; the lessor of the plaintiff on the one hand, and the defendant on the other. The defendant's liability, it is admitted, still remains in

(a) 2 Stra. 1056.

(c) Barnes, 119.

(b) 1 Q. B. 426; See S. C.

(d) 7 Dowl. 584.

9 Dowl. 1040.

the present case ; but his security, namely, the liability of the lessor of the plaintiff, is, it is said, gone with his death. Any inequality between the condition of the two parties, is, I think, ground for the Court to interfere, and compel equity to be done. There would be an injustice if the one party could have his costs if he succeeded, but the other party not. I think, therefore, that the defendant is entitled to have security for his costs, and, upon that being done, that this rule must be discharged.

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Rule accordingly.

In re GEE, Gent., one, &c.

THIS was a rule calling on an attorney of the name of Gee, to shew cause why he should not, in pursuance of his undertaking, pay to Messrs. Chappell and Risley, or to Mr. Kendall, the sum of 6*l.* 19*s.* 4*d.*, together with the costs of this application.

It appeared, from the affidavit of Mr. Chappell, in support of this rule, that he was an attorney, and that in March, 1844, he was consulted by Mr. Kendall, respecting the sale of certain property in Hertfordshire, of which Mr. Kendall was mortgagee. Mr. Perry, the mortgagor, had died, and his wife, to whom he had devised the property, was endeavouring to effect a sale of it. Mr. Kendall on that occasion deposited the title deeds of the property with Chappell, and instructed him to act for him in the matter of the sale, and to communicate on the subject with Mr. William Gee, the solicitor for Mrs. Perry; at the same time handing over to him a letter from Mr. Gee, in which that gentleman requested he might be furnished with an abstract of title. Chappell thereupon wrote to Mr. Gee, offering to prepare an abstract; and did proceed to prepare a portion of it, when he received a letter from Mr. Gee, saying it would not be

Where the attorney of a mortgagor, who was desirous of selling the property, had induced the attorney of the mortgagee to give up the title deeds, &c., on his undertaking to pay him the costs of preparing the abstract of title, &c.; the Court granted a rule, ordering him to pay the amount pursuant to his undertaking.

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required. That finding the property was small, and Mrs. Perry in poor circumstances, he waived his right to complete the abstract. That afterwards, on the 11th of May, Mr. Kendall called at the office of the deponent, in company with Mr. Gee, and stated that Mr. Gee had called upon him to get the conveyance immediately executed, and to pay the mortgage money. That Chappell then told Mr. Gee, that it was very unusual to require the completion of any transaction of that nature, without an appointment for the purpose; and that he had not prepared his bill of costs of the said S. Kendall in the said transaction, and that he could not then do so; whereupon Gee stated, that if Chappell would allow Kendall to execute the said conveyance, receive his principal and interest, and hand over the title deeds of the mortgaged hereditaments and premises to him that he would be in town again in a few days, and would then call and pay Chappell the amount of his costs. Chappell at first objected to this arrangement, on the ground that it was unusual for a mortgagee to part with deeds until his costs, as well as the amount of principal and interest, were paid; but proposed, in order to settle the matter at once, to take the sum of 5*l*., in payment of his costs; but Gee objected to pay a sum without having a bill of such costs, alleging that Mrs. Perry would not be satisfied without such bill. Chappell then being urged by Gee to allow the matter to be completed (and believing Gee to be a person of respectability, and one upon whose word he might safely rely) said "Well, Mr. Gee, if you will undertake to pay my costs, I shall be satisfied;" whereupon Gee replied, "Very well, I will do so, and if you will send me the bill of costs, I shall be in town again in a few days, and will call and pay them." That Chappell then allowed Mr. Kendall to execute the said conveyance, and handed over the title deeds to Mr. Gee. The affidavit then stated, that "he would not have parted with the possession of the said deeds until his costs were paid, except upon the express personal guarantee of the said Mr. Gee." That he had since furnished a bill of

costs amounting to the sum of 6*l.* 19*s.* 4*d.*, and made numerous applications for payment, without success. There was also an affidavit by Mr. Kendall, corroborating the above statement of what took place in his presence.

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In opposition to the rule, there was an affidavit by Mr. Gee giving his account of the transaction. It stated, that he admitted that Chappell did, at the interview in question, say that he would have some charges to make in the business against Mrs. Perry; to which he had replied, that if Chappell would forward it to him, he had no doubt it would be discharged by the said Mrs. Perry when he happened to come to town; and that he never gave any written or verbal promise to pay the amount of the said bill of costs out of his own proper monies; but that all he said was with reference as before stated, and to no other or greater extent.

Humfrey shewed cause. The question here is, whether this is an undertaking on the part of Mr. Gee as attorney, on his own behalf, or only on behalf of his client Mrs. Perry; and it is submitted, that the affidavits which would otherwise be contradictory, may, in the latter view of the case, be construed so as to be perfectly consistent. Mr. Chappell may have conceived that Mr. Gee was promising on his own account; while Mr. Gee may have been careful to avoid the use of any language, which fairly could bear such construction. But even if the Court should be of a different opinion, and conceive Mr. Gee to have undertaken to pay the costs personally, it may be very questionable if this Court will interfere. This is not the case of an undertaking between attorney and client; nor is it an undertaking in a cause or suit, in which the one attorney was acting for a plaintiff and the other for the defendant; but it is a promise by Mr. Gee to pay the costs incurred by another party, and for which he could receive no benefit. There is no instance of an application by one attorney to compel another to perform an engagement not given in any action

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or suit. This agreement is clearly within the Statute of Frauds, and cannot be enforced; unless the Court exert its discretionary authority over Mr. Gee, as one of its officers.

Crompton, in support of the rule, was stopped.

COLERIDGE, J.—The question here is, was this an undertaking by Mr. Gee in his character of attorney; and I think, upon the whole facts of the case, that it was, and that this rule must, therefore, be made absolute. Upon the facts disclosed in the affidavits, there can be no doubt that credit was given to him, because he was the attorney of the mortgagor. It is said there is a distinction between the case of an attorney who may be called upon by his client to perform his undertaking, and that of an attorney, who is not acting in any suit or action, and who is called upon by the attorney of another party; but I can see no foundation for this distinction, and I think the two cases stand upon the same ground. The question in either case is, has the undertaking which it is sought to enforce, been given by the attorney in his character of attorney in the transaction in dispute.

Now on the present occasion, it appears, that Mr. Gee goes, with a party, not his own client, to the office of Messrs. Chappell and Risley; and, therefore, that he goes out of his way to get these deeds; though it is said that he had no interest in the matter. It was, however, of course an object to his client to get the affair settled. Mr. Chappell then mentions that they have a bill of costs against his client, Mrs. Perry; whereupon Mr. Gee says in effect, it is an object to us to get the deeds, and if you will, therefore, deliver them up, I will see you paid. This is all very likely to have happened, and indeed it is substantially uncontradicted. It is, no doubt, sworn, that Mr. Gee only said, that if Mr. Chappell would forward the bill to him he had no doubt it would be discharged by Mrs. Perry, when

he came to town; but I cannot help thinking that Mr. Gee's recollection in the matter is not quite accurate.

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By making this rule absolute there will be no hardship on Mr. Gee; because he may get paid by his client Mrs. Perry, and the bill itself may be referred to the Master for taxation. The rule will, therefore, be absolute.

Rule absolute.

ANON.

WHITE moved for a *distringas* in this case to compel an appearance. The peculiarity was, that the calls had been made at the defendant's place of business, and the appointments made with a clerk of the defendant's; but it did not appear that any calls had been made at the defendant's residence, or that it was not known, or that any efforts had been made to discover it.

Where the calls had been made at the defendant's place of business, but it did not appear that the defendant's residence was unknown, or that any efforts had been made to discover it, the Court refused to grant a writ of *distringas*.

COLERIDGE, J.—That is not sufficient.

Rule refused (*a*).

(*a*) See *Russell v. Knowles*, *ante*, p. 595; See S. C. 8 Scott, N. R. 716.

REGINA v. GOMPERTZ and Others.

PEACOCK moved to quash an indictment against the defendants for a conspiracy, which had been removed into this Court by certiorari. The indictment alleged the offence to have been committed at "Gray's Inn, in the county of Middlesex," whereas, there is no such place from

The Court refused to quash an indictment for conspiracy, which had been removed into this Court, on the ground that the offence

was alleged to have been committed "at Gray's Inn, in the county of Middlesex."

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whence a jury could be summoned to try the
 ment. [*Williams, J.*—There is a county named
 necessary to state the place within the county in wh
 offence is supposed to be committed?] The o
 would be cured by verdict by the 7 Geo. 4, c. 64, s
 but in the present case, the application is before trial

In *Rex v. Harris (a)*, it was held that an indi
 laying the offence to have been committed “at the
 hall of the City of London,” was bad, for the venue
 be laid in some parish or ward. The case of
Thomas (b) is an authority for the Court to quas
 indictment on motion.

WILLIAMS, J.—I am of opinion that this obj
 cannot prevail. The case of *Rex v. Hollond (c)*, wh
 generally cited as laying down the rule that time and
 must be added to every material allegation, was do
 before the late act (*d*), by which the jury, in cr
 as well as civil cases, is to be returned of the bc
 the county generally, and not de vicineto as for
 I am not satisfied, therefore, that if the words “(
 Inn” had been entirely left out, the indictment
 not have been sufficient; and, if so, being inser
 do not see that they can invalidate it, as it appea
 tinctly that the offence was committed within the cor

Rule refused

(a) 2 Leach. C. C. 800.

(b) 3 D. & R. 621.

(c) 5 T. R. 607.

(d) 6 Geo. 4, c. 50, s. 1.

(e) This case was deci
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AFFIDAVIT (ENTITLING).

See ATTACHMENT, 3.

An affidavit in support of a motion to make the order for taxing an attorney's bill on which the Master's certificate is indorsed, a rule of Court, under the 6 & 7 Vict. c. 73, s. 43, with a view to enforce the payment of the amount, should be entitled in the matter of the attorney, and not of the client as well as of the attorney. *In re Thomas Hare*, 269

AFFIDAVIT OF DEBT.

An affidavit to hold to bail under the 1 & 2 Vict. c. 110, stated "that the defendant was a lieutenant in the 78th regiment of foot, which regiment is under orders to embark for India, and deponent believes and has no doubt that it is the intention of the defendant to embark with his regiment and quit England on military service for India:" *Held*, sufficient. *Askenheim v. Colegrave*, 642

AFFIDAVIT OF INCREASE.

See TAXATION, 3.

AFFIDAVITS (USING).

See ARREST.

1. Where a party is under terms to file his affidavits by a certain day, and by reason of some excusable accident, he omits to do so, the rule for permission to use an affidavit subsequently filed, is a rule nisi only, in the first instance. *Pryor and Another v. Swaine*, 37

2. After verdict for the plaintiff before the under-sheriff, a Judge at Chambers, in Vacation, had stayed proceedings on affidavits imputing misconduct to the jury. A rule nisi for a new trial was obtained, which was drawn up on reading the affidavits filed at Chambers: *Held*, that the party shewing cause might use affidavits in answer. *Standewick v. Hopkins*, 502

ALTERATION.

See PLEA, 18.

AMENDMENT.

See DISTINGAS, 3.

LACHES, 4.

PAUPER, 2.

WARRANT OF ATTORNEY, 6.

WRIT OF TRIAL, 8.

1. A writ of summons may be amended by adding the name of a plaintiff, where it appears that the debt would otherwise be barred by the Statute of Limitations. *Brown and Another v. Fullerton*, 251

2. To assumpsit by indorsee against acceptor of a bill of exchange, the defendant pleaded, that at one sitting he lost to C., who won of him, a sum exceeding 100*l.* by gaming and playing at vingt-un; and that afterwards, the defendant, at one sitting,

ARBITRATION.

lost to C., who won of him another sum exceeding 100*l.* by gaming and playing at hazard; and that the defendant accepted the bill in part payment of those sums. At the trial, it was proved that the defendant and C. had played together at vingt-un and hazard, and that C. had won at the latter game; but there was no evidence that the defendant had lost at vingt-un: *Held*, that the Judge at nisi prius might amend the plea under the 3 & 4 Wm. 4, c. 42, s. 23. *Cooke v. Stafford*, 399

3. Where, under a Judge's order, an amendment of the record was made, on payment of costs: *Held*, that the party, receiving those costs, was precluded from moving to rescind the order. *Simmons v. King*, 786

APPEARANCE.

See WARRANT OF ATTORNEY, 5.

Where a defendant on his arrest under a Judge's order, deposited a sum of money in lieu of bail under the 7 & 8 Geo. 4, c. 71, and the writ of summons had expired without service on the defendant, the Court refused to allow the plaintiff to enter an appearance for the defendant. *Vizetelly v. Wickoff*, 853

ARBITRATOR.

See ARBITRATION, 8, 14.

ARBITRATION.

See TAXATION, 2, 11.

1. A submission made between the executors of a deceased partner, and the surviving partner and others, recited a partnership as existing under an agreement from the 1st of January, 1837, and that it was alleged by N., the surviving partner, that a partnership had existed between him and the deceased, previous to the date mentioned, and that differences had arisen

between the parties touching the accuracy of certain statements of accounts delivered by N., showing the amount to which the deceased partner was entitled in respect of the said partnership, &c., and also touching several other matters and things touching the said account, and touching the administration of the estate of the deceased partner; and witnessed that the parties accordingly agreed to refer the same, and also all other matters and things in difference between the said parties. The arbitrator found that a partnership had existed between the said parties from the 18th day of December, 1835, up to the time of the death of the deceased partner, and that a certain sum was due as the balance upon the account: *Held*, sufficiently specific and certain, and that he was not bound to find separately how much was due under the partnership, under the agreement in 1837.

On motion by an executor and trustee under a will to set aside an award under a submission entered into by himself and other trustees and legatees for the purpose of ascertaining the assets and settling the accounts under the will: *Held*, that it was no objection that certain married women who took interests under the will, which were affected by the award, were parties to the submission: Nor that there were certain infant legatees who were not bound thereby, who were also interested: Nor that the matters submitted affected the trust estate of married women and infants.

By the deed of submission, it was covenanted that the parties thereto should execute all such deeds, &c., as might be requisite for putting an end to the differences, and administering the estate and effects, &c., and carrying into execution, the trusts, &c., as the arbitrator should direct; even if such deed were to be between them and a stranger to the submission:

Held, no excess of authority that the arbitrator had directed that in consideration of certain sums paid and to be paid, conveyances should be executed of certain freehold and leasehold property of the deceased; although one of the conveyances was to be to a stranger to the submission; the affidavits shewing that the question of these conveyances had been discussed before the arbitrator, with the assent of all parties, and that it was one of the matters in dispute between the parties, and intended to be referred by the deed of submission.

Nor was it held any objection, that the award directed one of the parties thereto to pay the amount of the legacy duty on certain shares of the assets, of which he had become the owner. *In the matter of the Arbitration between the Rev. A. S. Warner and Others*, 148

2. The plaintiff and the defendant referred the cause to arbitration, to which reference, C. was a party. C. was ordered by the award to pay a certain sum to the plaintiff. The plaintiff became bankrupt. The plaintiff's attorney in the action claimed the sum awarded from C. as in part payment of his bill of costs: *Held*, that this Court would not, at the instance of the attorney, order C. to pay the sum awarded to him; although he claimed a larger sum as due to him in respect of his bill of costs. *Holcroft v. Manby*, 319

3. A rule, calling on a defendant who resides in the country to pay money due on an award, is a six day rule; and where such rule was moved for on the 21st of November, the Court refused to make it returnable either on the last day of that Term, or at Chambers. *Arthur v. Marshall*, 376

4. Where a cause, and all matters in difference, are referred to an arbitrator, who is to make an award; the costs of witnesses, &c. attending be-

fore him, are costs of the reference, and not costs of the cause. *Brown v. Nelson*, 405

5. Where a matter is referred to the determination of two or more arbitrators: *Seemle*, the award should be executed by all at the same time, and in the presence of each other. *Stalworth v. Inas*, 428

6. In an action on an award, the declaration stated the award to be made "of and concerning the premises." The plea set out the submission and award in terms. The submission recited, that the parties thereto were relatives, and entitled to a distributive share of the effects of M., who died intestate; that the estate of M. consisted of *debts*, farm stock, cattle, corn, implements of husbandry, household goods, furniture, and *other effects*; that differences of opinion had arisen as to the value of the farm stock, cattle, &c., (not naming the debts); and that it was agreed to refer all disputes between the parties to arbitration. The award, which was made "touching and concerning the matters in difference," found that the defendant, who was the administrator of M., had moneys, farm stock, cattle, corn, &c. of M., to the value of 926*l.*, (but did not mention the effects). It awarded that the defendant should retain a certain sum, for the purpose of paying the rent and taxes of certain tenements in the occupation of M. at the time of his decease; and that the defendant should pay to the several parties their respective *distributive shares* of the residue of the estate of M. On special demurrer to the plea, it was objected to the award that it was bad, on the grounds, first, that the arbitrator had omitted to find the value of the "effects," or of the tenements mentioned; secondly, that it did not state the amount of the debts; and, thirdly, that it did not find the amount of the distributive shares.

Held, that upon these pleadings, as

the award was expressly made of and concerning the premises, the Court would intend that the arbitrator had adjudicated upon all matters referred to him; and that, if he had done so, the omission should not be shewn by plea. *Nichols and Susannah, his Wife, v. Mitchell, Administrator of Mitchell*,

7. The Court in general requires the same formalities to be observed as to personal service, when an application is made for a writ of execution under an award, as in cases of 1 & 2 Vict. c. 110, s. 1.

Where, however, it clearly appears from the admission of the parties that he was aware of the award and its contents, the Court, under special circumstances, granted a rule on him to shew cause why he should not pay the sum awarded, &c.

By an order of reference made between one W. C. and another, one of the parties became a party, the cause was referred to an arbitrator to settle the amount of the verdict, "all matters in difference between the parties to the action, and between the defendants and W. C.;" the arbitrator awarded the cause to abide the event, and other costs to be in the discretion of the arbitrator. The arbitrator awarded W. C. as a party to the action, 40*s.* damages to be paid by the defendants to the plaintiff, and to W. C.: and that the defendant should pay the costs of the reference and award. There was an order for taxation of the whole cost of the reference. The Court discharged a rule calling on the defendants to pay the amount awarded, and the costs as assessed, leaving the parties to their dispute by action. *Hawkins v. Benbow*, *Another*,

8. Where upon a rule to set aside an award on the ground that it was not final, and that the arbitrator was not awarded on one of the mat-

difference, the Court ordered, under a clause to that effect in the submission, "that the matters referred, &c., be remitted back to the arbitrator for his reconsideration and re-determination:" *Held*, that the arbitrator was bound to hear evidence tendered by one of the parties respecting the matters in difference, which had come to the knowledge of that party since the making of the original award.

Semble, that the clause in a submission of reference empowering the Court to remit the matters back to the arbitrator, should be to remit the matters, "or any of them;" so that the Court may be enabled to limit the remittal.

Quare, if the Court, under such a clause, have power to remit the matter back to the arbitrator a second time? *Nickalls v. Warren*, 549

9. A declaration contained counts for goods sold, money had and received, money paid, and money due on an account stated. The defendant pleaded non assumpsit, payment, and set-off.

After issue joined, it was agreed that all proceedings in the action should be stayed, and the action and all matters in difference referred to two arbitrators, the costs of the action to abide the event of the award. The arbitrators awarded that the defendant was indebted to the plaintiff in a certain sum, and directed final judgment to be entered for the plaintiff for that sum: *Held*, that the award was bad, there being no specific finding upon the issues raised on each of the counts in the declaration, by the plea of non assumpsit. *James Kilburn v. William Kilburn*, 633

10. Where there is a doubt as to the validity of an award, the Court will not grant a rule under the 1 & 2 Vict. c. 110, s. 18, calling on the party to pay the sum awarded. *Dickinson v. Allsop and Another*, 657

11. Where an order of reference contains a clause restraining the parties from bringing a writ of error, they are precluded from moving in arrest of judgment. *Chownes v. Brown*, 706

12. Upon reference of a cause and all other matters in difference, it was ordered that the costs of the cause, and of the reference and award, should abide the result of the award. The arbitrator found that the plaintiff had no cause of action in respect of the first count of the declaration; but that, in respect of the other counts, the defendant was indebted to the plaintiff in the sum of 68*l.* 9*s.* 7*d.*, and that on the taking of all the accounts, including that sum, the plaintiff was indebted to the defendant in 17*l.* 7*s.* 5*d.*, which sum he ordered the plaintiff to pay, but said nothing about the costs. Before the award was made, a fiat in bankruptcy issued against the plaintiff: *Held*,

First, that the finding of the arbitrator was sufficiently certain, the matter really referred being the state of the accounts between the parties, which was the result to be ascertained; and, consequently, that the defendant was entitled to his costs.

Secondly, that the bankruptcy did not operate as a revocation of the submission.

The award directed, inter alia, that the plaintiff should deliver to the defendant a warrant for a hogshead of wine, marked 2,260. The defendant having demanded the delivery of the wine: *Held*, that the demand ought to have been made of the warrant; but that an attachment might issue for the non-performance of the other parts of the award. *Hemsworth v. Brian*, 844

13. Where a declaration contains several counts, and before plea pleaded, the cause is referred to arbitration; the arbitrator is not bound to find specifically upon each count. *Bearup and Another v. Peacock*, 850

14. It is admitted that the award directed in substance that the awarding parties should be bound, which being admitted it is unnecessary to state that the awarding parties that the award directed was not intended as a term of the award, and removed the award is evidence. *Held*, in granting for setting aside the award for misconduct on the part of the arbitrators. *Blair v. Blair*. 154

15. It was also held, after being joined, having been referred to arbitrators, but no power given to award a verdict: the arbitrators awarded a verdict to be entered for the defendants, and directed the plaintiffs and defendants respectively to execute mutual releases of all manner of actions, &c.: *Held*, that the award was bad for excess of authority, and that that portion of it relating to a verdict to be entered could not be rejected as redundant; since, if struck out, the meaning of the award would be altered. *Hastford and Another, Executors of Beard v. Stacks and others*. 506

16. An affidavit verifying a copy of the award to be a true copy, need not state that the copy has been compared with the original award. *Ibid*.

17. By a deed of submission dated the 25th of August, 1840, between G. M., J. M., and W. W., as trustees and executors of G. M. deceased, &c., and also as trustees, &c., and R. M.; after reciting that disputes had arisen between the parties touching the estate and effects of G. M., deceased, and touching several other matters and things, the parties referred the same to the award of T. S. and J. J., and such third person as umpire as they should appoint, and agreed to abide by their award touching the premises or "any thing in any wise relating thereto." The arbitrators made an award directing that R. M. should pay a certain sum to G. M., J. M., and W. W., but not stating whether

it was proposed to them to direct the sum of trustees and executors of G. M. deceased, &c. They also directed that it should be payable with interest in a lump sum to the said trustees, and it was paid by G. M., J. M., and W. W. The award is voidable, by the award directed to be paid by the J. M.: until out of the award such sum, the said sum shall be paid: *Held*, that the award was excessive, and void, and the award was bad. In the matter of arbitration between George May, John Morpeth, and William Wicks, Trustees and Executors of George Morpeth, John Morpeth, William Wicks, Trustees of, and Robert Morpeth.

18. On the same day that the award was executed, the arbitrators issued the following memorandum at the end of it, in the presence of the parties: Memorandum, that before proceeding with the within-mentioned arbitration, we appoint W. L. to be present in case we cannot agree: making our award; and that the award is to be delivered on or before the third day of November next. *Held*, that they had no authority to limit the time, as the deed did not so, so as to vitiate an award subsequent to the time limited.

19. One of the parties to the award had no notice of a meeting of the arbitrators, at which, however, no business was transacted beyond adjourning the meeting. He afterwards attended at a subsequent meeting, and entered in a protest against the proceedings; but on another and different ground, that that of want of notice to attend the former meeting: that the want of notice was, under the circumstances, no ground for setting aside the award.

ARGUMENT.

See BEGIN (RIGHT TO).
SPECIAL CASE.

Where a demurrer is set down for argument on the Monday, the parties have the whole of the preceding Wednesday to deliver the paper books. *Hodkins v. Cook, Executrix of A. Cook,* 894

ARTICLED CLERK.

See BARRISTER.

ARREST.

See AFFIDAVIT OF DEBT.
APPEARANCE.
CAPIAS.
CONSIDERATION.

On an application to hold a defendant to bail, the plaintiff may use affidavits made in another Court in an action against the same defendant at the suit of a different plaintiff. *Langston v. Wetherall,* 858

ARREST OF JUDGMENT.

See ARBITRATION, 11.
DECLARATION, 3.

ARREST (PRIVILEGE FROM).

A chaplain in ordinary of the Queen is privileged from arrest on final process. *Winter v. Dibdin,* 211

ASSIZE, (COMMISSIONERS OF).

See MANDAMUS, 3.

ASSUMPSIT.

See COUNTS, (JOINDER OF).

ATTACHMENT.

See ARBITRATION, 7, 10, 12.
WITNESS, 2, 3.

1. The defendant's attorney in the above cause had been served by the
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plaintiff with a subpoena duces tecum, at Chelsea, just before 10 o'clock at night, to attend at Westminster next morning at 9 o'clock, to produce certain documents which were at his office in Symond's Inn. He was clerk to the board of guardians, and vestry clerk, and in his duty as such, attended that morning a meeting which had been previously fixed, believing that he would still be in time to attend the trial: but a special jury case, which it was expected would have lasted the whole day, suddenly terminating, the above cause was called on about 10 o'clock in the morning, and the record, in consequence of his absence, withdrawn. The Court made a rule absolute for an attachment against him. *Jackson v. Seager,* 13

2. Wherever force or fraud is used for the purpose of perverting the course of justice, either by the parties, or by a stranger to the suit, they are liable to be attached for a contempt of Court.

A Judge at Chambers having ordered the plaintiff's attorney to deliver particulars under the 2 Wm. 4, c. 39, s. 17, the plaintiff furnished his attorney with a false account: *Semble*, that the plaintiff was liable to be attached; though the Judge's order had not been made a rule of Court. *Smith qui tam v. Bond,* 460

3. The affidavits on a motion to discharge a party out of custody, against whom an attachment has issued in a cause, should be entitled, The Queen against the person attached, in the original cause; and not in the original cause simply. *Brown v. Edwards,* 520

4. The Court refused to grant an attachment against the defendant for an attempt to persuade a material witness for the plaintiff not to give evidence at the trial; it not being shewn that the witness was prevented from being subpoenaed by means of the de-

1010 ATTESTING WITNESS.

defendant's interference. *Schlesinger v. Flersheim*, 737

5. In an action by the assignees of a bankrupt to recover the value of certain letters patent alleged to have been fraudulently assigned by the bankrupt to the defendant, an order of Court was made, to which one W. J. became a party, directing that a juror should be withdrawn, and that a suit in equity between the parties be dismissed, that the defendant and W. J. should abandon their claim to the patents, that the patents and assignments to the defendant should be given up, and that the defendant should execute an assignment on one of the patents on demand to the plaintiffs: also that the plaintiffs should pay to W. J. 750*l.*, and to the defendant 100*l.*; and that W. J. be allowed to execute orders on hand to the extent of ten thousand spindles, without paying the patent right, and ten thousand more on paying 4*d.* per spindle: also that the defendant do pay to W. J. the sum of 750*l.*, and also 4*d.* a spindle, patent right, upon ten thousand spindles; that W. J. do, at the expense of defendant, release all claims against him; and that the defendant do pay to W. J. all costs necessarily incurred on occasion of this rule or order: *Held*, on motion for an attachment against the plaintiffs for not paying the 100*l.* to defendant, that the various acts to be performed by the defendant and W. J. were in the light of positive directions; and not of conditions precedent, the performance of which the defendant was bound to allege, in order to entitle himself to the attachment. *Bowker and Another, Assignees, &c. of Potter v. Tebbutt*, 787

ATTESTING WITNESS.

The attorney who signs an insolvent's petition for protection under the 5 & 6 Vict. c. 116, is not an at-

ATTORNEY, (PRIVILEGE OF

testing witness and need not be called to prove it. *Bailey v. Bidwell*, 24

ATTORNEY.

See ATTESTING WITNESS.

BARRISTER.

CERTIORARI, 3.

TAXATION, 1.

1. Where an attorney had died intestate, with whom the applicant was serving his articles of clerkship, and his widow was a minor, and no letter of administration were likely to be taken out: the Court granted a rule calling on the widow to shew cause why the applicant, who was of age should not be at liberty to re-attach himself for the remainder of the term which he had to serve. *Ex parte Lewis*, 134

2. Where an attorney, who was entrusted by executors with a sum of money to pay certain legacy duties had given an undertaking so to apply it, but had failed to do so; the Court refused to exercise its summary jurisdiction to compel him to refund the money; it not appearing that he had been otherwise employed by the executors in his professional character or that the employment in question was one which it necessarily required an attorney to perform. *In re Webb* 93:

ATTORNEY, (BILL OF).

See REPLICATION, 8.

ATTORNEY AND AGENT.

See TAXATION, 13.

ATTORNEY AND CLIENT.

See ARBITRATION, 2.

TAXATION, 16.

ATTORNEY, (PRIVILEGE OF

The rule that the attorney, su jointly with an unprivileged person

ATTORNEY.

shall lose his privilege of being sued in his own Court, is not altered by the Uniformity of Process Act.

In an action against three defendants, D. pleaded that he and the other defendants were attorneys of the Court of Q. B. : and the plaintiff replied that K., one of the defendants, was an attorney of C. P. ; to which D. rejoined that K. was also an attorney of Q. B. : *Held*, that K. was in the situation of an unprivileged person, and that, consequently, D. was not entitled to remove the cause. *Rastrick v. Beckwith and Others*, 624

ATTORNEY, (RE-ADMISSION OF).

After a lapse of thirty-nine years, the Court refused to re-admit an attorney without examination, although for the last seventeen years he had been acting as a county magistrate. *Ex parte Philip Vyvyan Robinson*, 9

ATTORNEY-GENERAL.

See WITNESS, 5.

ATTORNEY, (UNDERTAKING OF).

1. Where the attorney of the defendant had given an undertaking to pay the debt, in consequence of which the plaintiff stayed proceedings ; the Court enforced the undertaking ; although it was void under the 4th section of the Statute of Frauds. *In re Hilliard*, 919

2. Where the attorney of a mortgagor, who was desirous of selling the property, had induced the attorney of the mortgagee to give up the title deeds, &c., on his undertaking to pay him the costs of preparing the abstract of title, &c. ; the Court granted a rule, ordering him to pay the amount pursuant to his undertaking. *In re Gee, Gent., one, &c.* 997

BREACH.

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AUCTION.

See VENDOR AND PURCHASER.

AWARD.

See ARBITRATION, 5.

BANKRUPT.

See ARBITRATION, 2.

CONCURRENT PROCEEDINGS.

PLEA, 1.

SHERIFF, (RETURN OF).

TROVER.

WARRANT OF ATTORNEY, 7.

BANKRUPT COMMISSIONER.

See INSOLVENT.

BARRISTER.

A barrister cannot serve as an articulated clerk, for the purpose of being admitted an attorney, without first being disbarred. *In re Bateman*, 725

BASTARDY.

An order in bastardy, under the 7 & 8 Vict. c. 101, s. 3, did not state that the evidence, which the mother had produced, was given upon oath, or that the testimony in corroboration of a material particular had been taken upon oath : *Held*, bad. *Regina v. the Rev. W. B. Wroth, and the Rev. J. Rich, clerks*, 729

BEGIN, (RIGHT TO).

Where the defendant demurs to one count of a declaration, and the plaintiff demurs to a plea to another count ; the latter is entitled to begin, on the hearing of the argument. *Williams v. Jarman*, 212

BILL OF EXCHANGE.

See COUNTS, (STRIKING OUT).

BREACH.

See DECLARATION, 5, 6, 7.

T T T 2

CAPIAS.

See PRISONER, 2, 5.

VARIANCE.

The provisions of the stat. 2 Wm. 4, c. 39, s. 4, apply to cases where a defendant is arrested under a Judge's order, pursuant to stat. 1 & 2 Vict. c. 110, s. 3.

Where, therefore, the copy of a *capias* issued under the latter act, omitted to state the form of action mentioned in the original writ, the Court set aside the service of the copy, although the bail bond properly recited the form of action. *Copley and Another v. Medeiros*, 74

CASE.

See DECLARATION, 1, 3.

PLEA, 15.

CENTRAL CRIMINAL COURT.

See ESTREATING RECOGNIZANCE.

CERTIFICATE, (OF JUDGE).

See COSTS, 2, 3.

An application having been made to a Judge at Nisi Prius, to certify under the 3 & 4 Vict. c. 24, that the action was brought to try a right, &c. ; the Judge consented to grant the certificate, but the associate omitted to make any indorsement on the record. Two years afterwards, the certificate was drawn up and signed by the Judge: *Held*, that as the application for the certificate was made and granted in open Court, it must be considered that the parties consented to its proper entry on the record. *Jones v. Williams*, 247

CERTIORARI.

1. Where on an inquisition, post mortem, the jury found that the deceased had committed suicide, "whilst suffering under the cruel conduct of a Mr. S., a clergyman," and the coroner

had taken the above down as the finding of the jury: *Held*, that this Court would not grant a certiorari to bring up the inquisition for the purpose of quashing so much of the finding as was irrelevant. *Ex parte Scratchley*, 29

2. On motion to quash a writ of certiorari, quia improv. &c., it appeared, that the jurat of the affidavit, on which it was granted, and which was sworn before a commissioner, omitted the words "before me." The affidavit referred to a notice annexed, at the foot of which was written "this is the notice, referred to in the affidavit sworn before me, this 13th day of February, 1844, William Munton, &c.;" *Held*, that the above was a fatal defect, and that it could not be cured by reference to the annexed document, or waived by the lapse of several months between the time of the writ of certiorari being granted, and the present application. *Regina v. The Inhabitants of Bloxham*, 168

3. The affidavit of service of notice of an application for a certiorari, under 13 Geo. 2, c. 18, s. 5, stated that the notice was served on two justices, who were "two of the justices present at the Midsummer General Quarter Sessions, &c., held at, &c., on, &c., at which sessions the appeal was heard and confirmed," &c. *Held* insufficient, for not stating in terms, that the justices were present at the hearing and confirming of the appeal. *Held* also, that the fact of the sessions having granted a special case, did not dispense with the necessity of giving the notice.

Scmble, that a notice signed by "G. K., attorney for the said overseers of the poor of the said township of D. appellants," is sufficient; without any affidavit of signature, or of authority to give the notice. *Regina v. The Inhabitants of the Township of Darton*, 492

4. A rule for a certiorari to remove

an indictment from the sessions into this Court, on the ground that grave questions of law are likely to arise, and that a view is necessary, which cannot be had at the sessions, is not necessarily a rule absolute in the first instance; but it rests in the discretion of the Court so to grant it. *Regina v. Bird and Others*, 939

5. Where a rule for a certiorari to bring up an order of quarter sessions, confirming on appeal an order of justices under the Highway Acts, "with all things touching the same," had been obtained, and a return made, which did not include the order of justices; the Court made absolute a rule for a certiorari to remove the order of justices, although obtained pending the former rule. *Regina v. H. Morice, Clerk, and Another, Justices of Hertfordshire*, 952

6. An order of justices at special sessions, under the 4 & 5 Vict. c. 59, sec. 1, must show on the face of it, that the road in respect of which they proceed to adjudicate, is within the division for which the special sessions are held; but it need not show in what proportion of the rate the sum to be paid stands; nor out of which of the three rates permitted by the 5 & 6 Wm. 4, c. 50, the sum is to be taken. *Ib.*

7. The six months within which a certiorari must be obtained, run from the date when the quarter sessions adjudicate on the appeal, and not from the date of the original order of justices. *Ib.*

8. The powers conferred by the 4 & 5 Vict. c. 59, sec. 1, on "the justices at any special sessions for the highways holden after the passing of this act," apply only to a special sessions holden under the 5 & 6 Wm. 4, c. 50, sec. 45. *Ib.*

CHAMBERS.

See COUNSEL, (HEARING)

CHAPLAIN OF THE QUEEN.

See ARREST, (PRIVILEGE FROM).

CHARGING IN EXECUTION.

See PRISONER, 5.

CLERK.

See SERVICE OF RULE.

COAL ACT.

In a *qui tam* action for a penalty, under 1 & 2 Wm. 4, c. 76, sec. 75, for not delivering a coal certificate, containing the requisites mentioned in that act, the breach stated the certificate to be defective in several particulars:

Held, after verdict for the plaintiff, on motion in arrest of judgment, that the verdict was supported, if there were proof of the certificate being defective in any one particular.

The declaration charged the defendant with not delivering a certificate, containing "the price of the coals sold:" *Held*, on motion to enter a nonsuit, that this was no allegation that the coals were actually sold; and that no proof of sale was, therefore, necessary.

Quære, whether the act applies to cases of delivery without sale.

The declaration alleged as the ground of forfeiture, that the defendants did not deliver a certificate "signed by the defendants." The statute requires, that "every fitter or other person vending or delivering coals for the port of London, should send a certificate, signed by such fitter, containing," &c.: *Held*, bad, in arrest of judgment. *Grant, qui tam v. Matthewson and Another*, 75

COMMISSIONERS OF ASSIZE.

See MANDAMUS, 3.

1014 CONSIDERATION.

CONCURRENT PROCEEDINGS.

A party may take proceedings under the 5 & 6 Vict. c. 122, sec. 11 ; and at the same time proceed by action at common law for the recovery of the same debt. *Covington v. Hogarth*, 619

CONDITION.

See ATTACHMENT, 5.

CONSENT.

See INTERPLEADER, 3.
JUDGE, (ORDER OF).

CONSIDERATION.

See DECLARATION, 2.

A declaration stated that an action was depending at the suit of the plaintiffs against D. ; that D. was arrested and in custody of the sheriff by virtue of a capias duly issued in the action by order of a Judge, and indorsed for bail for 69*l*. ; that costs and charges had been incurred by the plaintiffs in the prosecution of the said action ; and that thereupon, in consideration that plaintiffs would discharge D. out of custody, the defendant promised to pay the plaintiffs the debt, interest, and costs in the action against D. Averment, that plaintiffs discharged D. Breach, non-payment. Plea, that there was not any claim or demand, or cause of action, against D. in respect of which the plaintiffs could or were entitled to recover in the action ; that plaintiffs, by discharging D., did not give up or part with any available remedy, as the plaintiffs then well knew ; that the arrest and proceedings were colourable only, and were not commenced for the purpose of trying any doubtful or contested question of fact : *Held*, on special demurrer to the plea, that the declaration disclosed a sufficient consideration ;

CONVICTION.

and that the plea was no answer, as it did not shew that the arrest was fraudulent or illegal. *Smith and Another v. Monteith*, 358

CONSTABLE.

See NOTICE OF ACTION.
PLEA, 32.

CONSUL.

See AFFIDAVIT, 1.

CONTEMPT.

See ATTACHMENT.
WITNESS, 4.

CONTEMPT OF COURT.

See ATTACHMENT, 2, 4.

CONTRIBUTION.

Assumpsit for money paid for the use of the defendant. It appeared at the trial that the plaintiff and the defendant had jointly taken the eatage of some pasture land, and had put on it their respective cattle : but there was no proof in what proportion each was to contribute to the payment of the rent, nor of how many cattle each might, or had, put on the land. The plaintiff brought his action for the moiety of the rent which he had paid ; and the jury having returned a verdict for the sum claimed : *Held*, there was no evidence to warrant them in finding a verdict for the moiety.

Quære, if these facts shewed a partnership between the parties ? *Sharpe v. Cummings*, 504

CONVERSION.

See SHERIFF.

CONVICTION.

See MANDAMUS, 1.
PRISONER, 10.

CONVICTION (OF PRISONER).

See WARRANT.

COPYRIGHT.

See PRISONER, 4.

CORONER.

See SHERIFF (RETURN OF), 4.

CORONERS' INQUISITION.

See HABEAS CORPUS, 1.

COSTS.

See CERTIFICATE (OF JUDGE).
TAXATION, 12, 15.

1. A rule was made absolute for a new trial, on payment of costs by the plaintiff. The costs were taxed, and demanded on the 4th of May. On the 8th, the defendant obtained a rule nisi to discharge that rule, unless the costs were paid before the fourth day of the ensuing Term. The plaintiff having, in the mean time, paid the costs: the Court discharged the rule, but ordered the plaintiff to pay the costs of the application. *Solly v. Langford*, 250

2. The plaintiff having obtained judgment upon demurrer to a replication, the cause went down for trial upon issues of fact, without a venire tam quam. The plaintiff recovered only 20s. damages, and the Judge refused to certify under 3 & 4 Vict. c. 24: *Held*, that the plaintiff was only entitled to the costs of the demurrer. *Poole v. Grantham*, 622

3. Where in an action for a libel, to which the defendant had pleaded the general issue and pleas of justification, the jury found a verdict for the plaintiff, damages one farthing; and the Judge refused to certify under the 3 & 4 Vict. c. 24, sec. 2: *Held*, that the plaintiff was not entitled to any costs. *Newton v. Roe*, 815

4. On a feigned issue under the Tithe Commutation Act, the successful party is to be allowed costs, unless he has disentitled himself by misconduct or otherwise. *Earl of Stamford v. Dunbar*, 852

5. A rule nisi was obtained for entering up judgment non obstante veredicto, on one of several pleas, which was made absolute on argument by this Court. A Court of Error afterwards reversed the judgment non obstante veredicto: *Held*, that the defendant was entitled to the costs of opposing the rule. *Evans and Another v. Collins and Another*, 989

COSTS IN THE CAUSE.

See ARBITRATION, 4.
TAXATION, 12.

COSTS OF THE DAY.

The defendants had obtained a rule for costs of the day for not proceeding to trial, on which the Master had indorsed his allocatur. The Court discharged a subsequent rule nisi, calling on the plaintiff to pay the amount so taxed. *Wright v. Burroughes and Others*, 94

COUNSEL, (HEARING).

The rule as to not hearing counsel at Chambers in Term time, does not apply to summonses originally returnable in Vacation. *Doe dem. Roberts and Others v. Roe*, 673

COUNTS (JOINDER OF).

A count for money had and received, will be allowed with a special count in assumpsit, for the breach of warranty of a horse, in which the breach was, that "the horse became and was of no value to the plaintiff, and that the plaintiff had been put to great expense in and about the feed-

1016 CRIMINAL INFORMATION.

ing, keeping, and taking care of, &c., and returning the same to the defendant." *Cahoon v. Burford*, 234

COUNTS, (STRIKING OUT).

A declaration contained twenty-five counts. The first fifteen were on bills of exchange drawn at Paris.

The next five, which related to the same bills, were special counts founded on the law of France; and the last five were on a special agreement to pay the bills in consideration of the plaintiff procuring their discount. Application having been made to strike out the last set of counts: *Held*, that they were not in apparent violation of the Reg. Gen., H. T., 4 Wm. 4, r. 5. *Gilbert v. Hales*, 227

COUNTY COURT.

See DEBT.
SHERIFF.

COURT (CONTEMPT OF).

See CONTEMPT OF COURT.

COVENANT.

See DECLARATION, 8.

CRIMINAL CONVERSATION.

See PLEAS (SEVERAL), 1.

CRIMINAL INFORMATION.

The Court refused to grant a criminal information against overseers for an alleged attempt to procure a pauper and his family to remove themselves clandestinely to another parish; where the remedy by indictment was open to the parties; and no circumstances were shewn, requiring the prompt interference of the Court. *Regina v. Jennings and Pexton*, 741

DEBT.

CROWN.

See WITNESS, 5

DAMAGES.

See COSTS, 3.
INSOLVENT,
WRIT OF TRIA

By the terms of an issue w rule, by which an issue w to be tried between the exco ditors as plaintiffs, and the of a bankrupt as defendant: the title to certain goods as a writ of fieri facias; the directed to sell the goods, proceeds into Court, to abide The assignees made no o these terms. The executio afterwards abandoned th *Held*, that in an action ag by the assignees to recover ence between the amount fo goods were sold, and th value; the jury were prope in estimating the damages, whether the sale was a fair fide sale; and if so, to assu amount realised by it, w value of the goods. *Wh Another, Assignees of John Shurry, v. Black and Ano*

DATE.

See EVIDENCE, 1

DEBT.

Debt will lie upon the j an inferior Court, though n

The plaintiff declared on obtained in a county Court defendant: *Held*, on specia that it was not necessary to declaration that the defend within the jurisdiction of Court, or that he was duly *Williams v. Jones*,

DECLARATION.

1. A declaration stated, that plaintiffs and defendants were owners of adjacent mines; that defendants had trespassed on plaintiffs' mine, and had carried away a quantity of coal; that water had arisen in the defendants' mine, against which, but for the trespass of the plaintiffs, the coal would have been a sufficient barrier; that thereupon it became and was the duty of the defendants to prevent the water in their mine, from flowing into the plaintiffs' mine; yet the defendants neglected their said duty, whereby the water flowed into the plaintiffs' mine, and prevented them from working the same: *Held*, on general demurrer, a good count in case. *Firmstone and Another v. Wheeley and Another*, 203

2. The plaintiff declared upon an agreement by the defendant, which recited that an estate had been mortgaged by W., since deceased; that plaintiff had joined in a bond as a collateral security for the mortgage money, and had afterwards been compelled to pay off a portion of it; that defendant had taken upon himself the management of W.'s affairs, had repaid plaintiff part of the money which he had paid, and had agreed to pay him the residue out of the proceeds of the mortgaged property when sold, and in the mean time to appropriate the rents of the premises to the payment of the same sum as that for which plaintiff had a lien on the premises; that defendant had requested plaintiff to release and convey his interest to A. and H., and that he had done so, reserving to himself a lien on the property as aforesaid. The agreement then stated that, in consideration of plaintiff having paid the said money, and having released and conveyed all his interest to A. and H., reserving to himself the said lien, defendant undertook and agreed to repay him the remainder of the sum so paid by him:

Held, on demurrer, that the declaration was bad, as it disclosed no consideration for defendant's promise. *Kaye v. Dutton*, 291

3. A declaration stated that the defendant wrongfully caused to be kept and continued large quantities of dirt and rubbish, before then, wrongfully placed upon a public highway, near a wall and a canal; by means whereof the plaintiff, passing along the highway, was induced and caused to walk over the rubbish, and to fall into the canal. Plea, not guilty: *Held*, on motion in arrest of judgment, that the declaration was good. *Goldthorpe v. Hardman*, 442

4. Where a writ of *capias* had been sued out in the Palace Court, in "a plea of trespass on the case," and the defendant removed the cause into this Court by a *habeas corpus*, &c., and the plaintiff delivered a declaration in this Court in the ordinary form, stating that the defendant, (without alleging him to be in the custody of the marshal, &c.,) had been "summoned" to answer the plaintiff "in an action on promises:" *Held*, that the declaration was irregular, in stating the defendant to have been "summoned," and must therefore be amended.

Semble, that the variance in the statement of the cause of action was immaterial. *Keane v. White*, 525

5. In an action against the sheriff for the improper execution of a *fi. fa.*, and for a false return, the declaration stated that a *fi. fa.* indorsed to levy 66*l.* 9*s.* 8*d.*, besides 16*s.* for the writ, officers' fees, poundage, &c., was delivered to the defendant, who, by virtue thereof, seized and took in execution goods of great value, to wit, of the value of the *moneys so indorsed* on the writ, and then could, and might, and ought to have levied the whole of the *moneys* thereout; yet the defendant did not levy the whole of the *moneys so indorsed*, but only a portion, to wit, the sum of 60*l.*, and

falsely returned that he had levied the sum of 43*l.* 15*s.* 9*d.*, and that the debtor had no more goods: *Held*, on special demurrer, first, that the words "moneys so indorsed" meant not only the debt, but the debt together with officers' fees, sheriff's poundage, &c. Secondly, that the breach was defective, in not alleging that a reasonable time had elapsed for converting the goods seized into money. Thirdly, that the second breach was well assigned; inasmuch as under the circumstances stated, it was a breach of duty to make a return of nulla bona as to any part. *Slade v. Hawley, Bart.*, 700

6. Assumpsit; the declaration stated that plaintiff being possessed as tenant of a certain house, and of certain fixtures and stock therein being, it was agreed between the plaintiff and the defendant, with the consent of the landlord, that the plaintiff should let the defendant into possession of the house for the remainder of the term, and should sell him the fixtures, &c., in consideration of a certain sum paid, and a certain other sum of 6*l.* to be paid on a certain day, on which day possession was to be given up. The defendant was to take the stock at a valuation, and certain deductions were to be made from the 6*l.* for rent and taxes which might then be owing from the plaintiff. And it was agreed that either party who should make default in any of the conditions, or fail to observe the agreement, "should forfeit and pay to the other of them the sum of 30*l.* on demand, to be recovered in any of her Majesty's Courts of law." It then averred, that although the plaintiff was always willing, and offered to let the defendant into possession, and to sell and deliver to him the fixtures and stock, and to allow the deductions agreed on from the 6*l.*; yet defendant would not pay the sum of 6*l.*, or any part thereof, or fulfil the terms of the

agreement so to do, or pay plaintiff the said sum of 30*l.*, part thereof, although often requested. *Held*, on special demurrer, the breach was well laid as for the payment of the 6*l.*; but that had been laid specially for the payment of the 30*l.*, it would be ill for not averring a default. *Maylam v. Norris*,

7. Assumpsit for not accepting paying for goods according to contract, with an averment of the plaintiff's readiness and willingness to deliver the goods, of which the defendant had notice: *Held*, on special demurrer, that the declaration was sufficient, and that it was not necessary that it should allege a tender, or refusal to deliver. *Boyd and Another v.*

8. *Semble*, in covenant for repair, the declaration should aver the term for which the premises were demised. *Turner v. Lamb*,

DE INJURIA.

See DUPLICITY.

PLEA, 1, 31.

REPLICATION, 8

DEMURRER.

See ARGUMENT.

DEPOSIT IN LIEU OF BAIL.

See APPEARANCE.

DETINUE.

See PLEA, 3, 21.

DISCONTINUANCE.

See TAXATION, 7.

DISCRETION OF JUDGE.

See SEVERAL DEFENDANTS.

DISTRINGAS.

DISTRESS.

See PLEA, 9.

DISTRINGAS.

1. The Court granted a distringas to compel an appearance, where on application, on two occasions, at the residence of the defendant, who was a lunatic, the deponent was informed that he could neither see the defendant nor the keeper; the deponent, on the last occasion, having explained the purpose of his visit, and left a copy of the writ with the servant. *Banfield v. Darell*, 4

2. On inquiry at the town residence of the defendant, who was a peer of Ireland, it appeared that the defendant was staying in Ireland, at his usual place of residence there. Calls were made, and a copy of the writ of summons left at his town residence; and another copy, enclosed to his address in Ireland. The defendant had taken no notice of these proceedings. The Court refused to grant a distringas. *Hay v. Earl of Charleville*, 16

3. Where a writ of distringas is returnable on a day out of Term, application to set it aside may be made more than eight days after execution, as it cannot be amended. *Badham v. Bateman*, 130

4. The Court granted a distringas to compel an appearance, where the defendant was in a lunatic asylum, and it appeared that his wife carried on his business. *Limbert v. Hayward*, 406

5. An affidavit of service of a writ of summons at a defendant's office, does not disclose a sufficient ground for a distringas; unless it appear that the defendant has no place of residence. *Russell v. Knowles*, 595

6. The affidavit for a distringas should state where the residence of the defendant is situated. *Crofts v. Brown*, 935

DUPLICITY. 1019

7. Where the calls had been made at the defendant's place of business, but it did not appear that the defendant's residence was unknown, or that any efforts had been made to discover it, the Court refused to grant a writ of distringas. *Anon*, 1001

DISTRIBUTABLE PLEA.

See ARBITRATION, 9.

DISTRIBUTIVE VERDICT.

See EJECTMENT, 4.

DUPLICITY.

See PLEA, 19.

REPLICATION, 2, 3, 5.

A declaration in trespass alleged that the defendants, on a certain day, assaulted the plaintiff, and imprisoned him, and kept and detained him so imprisoned for a long time, to wit, for the space of twenty-four hours. The defendants pleaded, "as to the said imprisoning the plaintiff, and keeping and detaining him in prison," that plaintiff made a disturbance in and outside a church during divine service, and committed a breach of the peace; and in order to prevent such disturbance, and preserve the peace, the defendants "did a little imprison the plaintiff, and keep and detain him imprisoned for a reasonable time in that behalf, to wit, until he ceased such disturbance and breach of the peace, to wit, for the space of two hours." The plaintiff replied *de injuriâ*, and also new assigned that the defendants imprisoned him after he ceased the disturbance and breach of the peace: *Held*, on special demurrer, that the replication and new assignment were not double. *Worth v. Terrington and Others*, 352

EJECTMENT.

See MESNE PROFITS.

RESTITUTION, (WRIT OF).

SMALL DEBTOR, 2.

1. A declaration in ejectment was entitled of Hilary Term, 8 Vict. (a Term not then arrived), and the notice was to appear in "next Easter Term," but bore no date. The service which was regular, was in March last. The Court granted a rule for judgment against the casual ejector.

Doe dem. Yeomans v. Roe, 23

2. In ejectment, a consent rule, not entitled in the cause, was delivered with a plea properly entitled. The plaintiff having signed judgment against the casual ejector, the Court refused to set aside the judgment as irregular. *Doe dem. Hunchecorne v. Roe*, 96

3. Where in ejectment the lessor of the plaintiff is ruled to reply, it is irregular to deliver the similiter without the consent rule. *Doe dem. Burnham v. Lever*, 644

4. A verdict in ejectment may be taken distributively, and the defendant is entitled to have it entered for him for that part of the premises to which the lessor of the plaintiff has failed to prove title. *Doe dem. Bowman and Others v. Lewis*, 667

ELEGIT.

See SHERIFF (RETURN OF), 3.

ERROR.

See ARBITRATION, 11.

LACHES, 4.

PRISONER, 10, 11.

RETRAXIT.

1. After judgment of nonsuit, on a rule for a new trial coming on to be argued, the parties, at the suggestion of the Court, agreed to state the facts in a special case, with liberty to turn it into a special verdict, with a view to the ulterior remedy of a writ of

error. The Court, after judgment for the plaintiff in the Court below, and a writ of error sued out, stayed execution without requiring bail in error.

Quere, if the Court have any power to stay proceedings without bail in error, under the 6 Geo. 4, c. 96: except in cases of judgment by default. *Williams and Others, Executors of Jones v. Downman*, 131

2. Where a writ of error was sued out on a declaration containing a count for interest in the usual form; and the error assigned was that no implied promise to pay interest arose from the facts alleged; the Court held the ground of error frivolous, and allowed execution to issue. *Nordenstrom v. Pitt*, 675

3. In an action by a joint stock company, the declaration commenced by stating that M. the secretary "for the time being" of the company, complains of C. D., who has been summoned to answer the plaintiff as such secretary by virtue of a writ, issued on the 2nd of March, &c. The defendant pleaded (amongst other pleas) a plea to which the plaintiff demurred the defendant rejoined by admitting the plea to be insufficient, and abandoned all verification thereof. The plaintiff proceeded to trial, and obtained a verdict on the other issues and the defendant brought a writ of error, on the ground; first, that it did not appear that the plaintiff was secretary at the time the writ issued secondly, that the defendants could not, after demurrer, abandon the plea: *Held*, on motion to set aside the writ of error as frivolous, that sufficiently appeared that the plaintiff was secretary at the commencement of the suit; and that the other ground of error was not frivolous.

Semble, that the defendant was not at liberty to abandon his plea (p *Alderson, B.*). *M'Intyre v. Mill and Others*, 70

4. Where the notice of allowance

of a writ of error and assignment of errors were not entitled in the original cause of "H. S. and H. M. H. against R. F. G., Esq., commonly called The Hon. R. F. G.;" but in "S. and Another against The Hon. R. F. G.:" *Held*, on motion to set aside the allowance and assignment of errors for irregularity, that the variance was immaterial. *Henry Sparding and Henry Mortimer Hummel v. Robert Fulke Greville, Esq., commonly called The Honourable Robert Fulke Greville*, 721

ESTOPPEL.

See AMENDMENT, 3.
PLEA, 33.

1. To debt on an indenture for non-payment of 600*l.*, and interest, the defendant pleaded by way of estoppel, the record in a prior action between the same parties on a bond conditioned for payment of the same 600*l.* with interest, in which action the defendant had pleaded that the bond was given in pursuance of a corrupt agreement for the purpose of securing a certain debt and usurious interest; to which the plaintiff had replied, that the bond "was not made by the defendant in pursuance of, or upon the said corrupt and unlawful agreement, or for the purpose in the said pleadings mentioned;" and the said issue joined thereon, &c., had been found for the defendant.

Held, no estoppel in the present action; inasmuch as the fact of an usurious agreement was not in issue in the former action, nor was the same agreement admitted on the record, by reason of that allegation not having been traversed. *Carter v. James*, 236

2. In covenant upon a deed demising the dividends from railway shares, on payment of a certain annual rent, the declaration stated that the plaintiff was possessed of or entitled to certain railway shares, and then set out the material portions of the deed, (which

also recited that the plaintiff was possessed of the railway shares), and the defendant's covenant to pay the rent, and alleged a breach of that covenant. The deed was set out on oyer. The defendant pleaded that the plaintiff was not possessed of or entitled to the shares: *Held*, upon special demurrer, that the defendant was estopped by the deed from pleading the above plea, notwithstanding the independent substantive allegation in the declaration that the plaintiff was possessed of the shares; and that it was not necessary to reply the estoppel, which sufficiently appeared upon the pleadings, *Beckett v. Bradley*, 586

3. A copy of a writ of summons having been served on the 6th of January, the plaintiff on the 13th received notice of a rule nisi to set aside the copy of the writ for irregularity, and that the rule would be drawn up at the opening of the office on the following morning. In the afternoon of the 14th, the plaintiff entered an appearance and filed his declaration, and two hours afterwards the rule was served: *Held*, that the defendant was not precluded from objecting to the writ. *Tiley v. Hodgson*, 655

ESTREATING RECOGNIZANCE.

On motion to estreat into the Exchequer, a recognizance into which the defendant had entered, with two sureties, for the purpose of removing an indictment for conspiracy from the Central Criminal Court into this Court: *Held*, that it was no objection that the recognizance was not entered of record in this Court; or that the application was with a view of obtaining the costs of the prosecution, on the defendant's being convicted, and the recognizance was not conditioned for their payment; or that it did not appear that there had been any notice of taxation; or that it did not appear

that the justice of the peace before whom the recognizance was taken, was acting within his own county. *Regina, on the Prosecution of William Hickinbotham, v. John Sydersff and Another,* 564

EVICTION.

See PLEA, 2.

EVIDENCE.

See EXECUTOR.

1. The statement in a declaration on a promissory note, that the defendant on a certain day, made his promissory note, does not require proof that the note bore date on that day.

Quære, if it require proof that the note was actually made on the day named. *Smith and Another v. Lord,* 759

2. To a plea of set-off to a bill of exchange, the plaintiff replied as to 19*l.* 3*s.* 2*d.*, a discharge under the Insolvent Act; and that he had inserted in his schedule "a full and true description according to the said act in that behalf, of the said debt or sum of 19*l.* 3*s.* 2*d.*." The defendant traversed this allegation in terms. At the trial, the plaintiff offered in evidence a schedule, in which the debt due from him to the defendant was inserted as 6*l.* 10*s.*; but gave no evidence to shew that the debts were the same: *Held*, that this proof did not support the issue. *Maile v. Bays,* 964

EXHIBIT.

Parties are not bound to take office copies of exhibits attached to affidavits. *Hawkyard and Another, Executors of Beard v. Stocks and Others,* 936

EXECUTOR.

See ARBITRATION, 1.
PLEA, 28.

1. In an action for money had and

FEME COVERT.

received against an executor, but no naming him as such, the plaintiff proved a notice to produce the probate of the will; and also a notice to admit "an office copy of the last will and testament of John Gale, of Lockridge in the parish of Overton, in the county of Wilts, bricklayer, proved at Marlborough, 19th April, 1813," and a Judge's order made for the admission in evidence of the document in question, which purported to be "extracted from the registry of the Archdeacon of Wilts," and to contain a copy of the will, and to be signed by "F. M., registrar," with an extract apparently from the Act Book, that the will had been proved and probate granted: *Held*, that the document was rightly admitted in evidence, without proof that the probate was in possession of the defendant, or of the signature of the registrar. *Waite, Executor of Gale v. Gale,* 92

2. An action for money had and received will lie against an executor who receives the money of third parties, without declaring against him as executor, 1

Quære, if in an action against an executor, there is any legal presumption that the probate is in his possession, 1

FACTOR.

See PLEA, 25.

REPLICATION, 3.

FEIGNED ISSUE.

See COSTS, 4.

FEME COVERT.

See ARBITRATION, 1.
ISSUABLE PLEA, 1.

On an application to discharge defendant out of custody, on the ground that she is a married woman the Court will require the strict negative proof from her, that she has

no separate property ; where it appears from the affidavits on the other side, that there are reasons for doubting such to be the fact. *Ferguson v. Robert Clayworth and Sarah his Wife*, 165

FRAUDS, (STATUTE OF.)

See ATTORNEY (UNDERTAKING OF), 1.

GAMING.

See AMENDMENT, 2.

GENERAL ISSUE.

See PLEA, 5, 10, 24.

GOODS BARGAINED AND SOLD.

See VENDOR AND PURCHASER.

HABEAS CORPUS.

See LANDLORD AND TENANT.
PRISONER, 6, 9, 11.

1. The Court refused to bail a prisoner, who was charged on a coroner's inquest with murder, and against whom a bill for the same crime had been found by the grand jury ; although his trial had been postponed in consequence of the absence of witnesses for the prosecution ; and it was alleged that, on the face of the depositions, as taken before the coroner, the charge of murder could not be sustained. *Regina v. Richard Andrews*, 10

2. A writ of ca. sa. against the defendant, was lodged with a sheriff's officer, with instructions to procure a warrant, and to execute the same. Afterwards, and after the warrant was procured, but before it was executed, notice was given to the same officer by the plaintiff's attorneys, that they withdrew the writ, and requested him not to execute the same ; but it did

not appear that the writ itself was ever taken out of the sheriff's office. The defendant was afterwards in the custody of the same officer at the suit of a third party : *Held*, on motion to set aside a writ of habeas corpus ad satisfaciendum, at the suit of the plaintiff, and to discharge the defendant out of custody as to the present suit, that the writ of habeas corpus, &c., was regular, and that the defendant could not insist that he was ever in custody under the first writ.

Quære, whether notice to a sheriff's officer not to execute a writ, is notice to the sheriff. *Howard v. Cauty*, 115

3. On return to a writ of habeas corpus, it appeared that the prisoner was detained by virtue of a warrant, purporting to be issued by a Court of quarter sessions in Ireland, and which was duly backed by the indorsement of a metropolitan police magistrate, under 44 Geo. 3, c. 92, s. 3. It stated that the prisoner "stood indicted in the peace office of the county of Tipperary," for "a rescue," and for "a riot," and directed "the police of the county of Tipperary" to apprehend him, "and him, so apprehended, in safe custody to keep, so that they might have his body before her Majesty's justices of the peace at the next sessions at," &c.

Held, that the warrant was bad for not shewing any jurisdiction, the term "peace-office" not being one to which the Court could attach a certain and definite meaning.

Held also, that the warrant was bad for directing the police to keep the party in custody till the next sessions.

Semble, that such a warrant should state that the party has not appeared and pleaded, or put in bail.

Semble also, that the Court would take judicial notice that "a riot" was an offence against the laws of Ireland.

But *quære*, if so of a "rescue?"
Regina v. Nesbitt, 529

HIGHWAY.

See CERTIORARI, 6, 7, 8.
DECLARATION, 3.

HUSBAND AND WIFE.

See PLEAS (SEVERAL,) 1.

ILLEGALITY.

See CONSIDERATION.

INCREASE, (AFFIDAVIT OF.)

See TAXATION, 3, 14.

INFANT.

See ARBITRATION, 1.

INDICTMENT.

See CERTIORARI, 4.
CRIMINAL INFORMATION.

The Court refused to quash an indictment for conspiracy, which had been removed into this Court, on the ground that the offence was alleged to have been committed "at Gray's Inn, in the county of Middlesex." *Regina v. Gompertz and Others*, 1001

INDORSEMENT, (ON PROCESS.)

See WRIT OF TRIAL, 7, 8.

1. A *qui tam* action of debt for penalties under the 6 & 7 Wm. 4, c. 66, is not within the Reg. Gen., H. T., 2 Wm. 4, r. II.; so as to require an indorsement of the amount of the debt, on the writ of summons and copy thereof.

Quere, where the alleged irregularity is the want of an indorsement, under the Reg. Gen., H. T., 2 Wm. 4, r. II., if the motion should be to set aside the copy of the writ and service. *Hobbs v. Young*, 474

2. Where a sum of money, less than the amount of the debt and costs

INSPECTION OF DOCUMENTS

indorsed on a writ of summons, has been paid and accepted within four days of the service, the defendant is not entitled to have the costs taxed under the rules of H. T., 2 Wm. 4, r. 11, and M. T., 3 Wm. 4, r. 5 unless it distinctly appear that the deduction was from the debt, and not from the costs; or that it was acknowledged on the part of the plaintiff that there was a mistake in the amount of the debt indorsed. *Young v. Crompton* 55'

INFERIOR COURT.

See DEBT.

INSOLVENT.

See ATTESTING WITNESS.

EVIDENCE, 2.

MANDAMUS, 3.

PLEA, 11, 17, 20, 27.

WARRANT OF ATTORNEY, 10.

A defendant in execution for the damages and costs recovered in an action of *assault and false imprisonment*, petitioned the Court of Bankruptcy under the 5 & 6 Vict. c. 116 and 7 & 8 Vict. c. 96. A commissioner made an order for his discharge. In an action against the keeper of the Queen's prison for an escape. *Hel* that whether this was or was not debt from which the commissioner has power to discharge the prisoner; the gaoler was not liable for an escape inasmuch as he acted in obedience to the order of a Judge in a matter over which he had jurisdiction.

*Sem*ble, that a commissioner of bankruptcy has no power under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, to order the discharge of a person in custody for damages recovered in actions of tort. *Thomas v. Hudson*, 87

INSPECTION OF DOCUMENTS

The Court will not in general gra

INTERPLEADER.

an inspection of documents, unless they are set out in the declaration, or the one party holds them as trustee or agent for the other.

Therefore, where a contract of marriage had been broken off, and the letters of the plaintiff to the defendant had been returned, the Court refused, in an action for a breach of the contract of marriage, to order an inspection of two letters from the plaintiff which had been returned to her, and which were said to contain a release of the action. *Gooldiff v. Fuller*, 661

INTENTION.

See ARBITRATION, 6.

INTEREST.

To a declaration in an action of debt on a promissory note, alleging a promise to pay 40*l.*, on demand, with lawful interest, and on counts for money lent, and on an account stated, the defendant pleaded, as to the said debts, that the defendant paid, and the plaintiff received, 150*l.*, in full satisfaction of the said debts, and of all damages sustained by reason of their detention : *Held*, that the interest was not merely damages, but was part of the debt, and recoverable as such upon this issue. *Hudson v. Fawcett*, 81

INTERIM ORDER.

See PRISONER, 7, 8.

INTERPLEADER.

See DAMAGES.

RELEASE.

SECURITY FOR COSTS, 2.

1. The Interpleader Act does not apply to adverse claims set up in respect of a sum of money due upon a contract for work and labour. *Turner and Another, Assignees of Edward Gibson, a Bankrupt, v. The Mayor and Corporation of Kendal*, 197
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2. An interpleader rule, directed that the possession money up to a certain date, should be paid, in the first instance, by the claimant, A. B., and finally by the unsuccessful party. A. B. afterwards abandoned his claim. On the sheriff being ruled by the plaintiff to return the writ, it appeared by his return, that he claimed to retain a certain sum for possession money, &c., but not for what period of time he claimed it to be due : *Held*, sufficient. *Reynolds v. Barford*, 327

3. Upon an application by the sheriff, under the Interpleader Act, a Judge at Chambers has no power to determine the rights of the parties without their consent ; and such consent should appear on the face of the order.

But where, upon such an application, the Judge made an order which was not stated to be by consent, but under which the parties acted ; it was held to be binding, as an adjudication upon a matter submitted to the Judge. *Harrison, Executor, &c., v. Wright*, 695

4. Where an under-sheriff, who was acting as attorney for certain creditors of the defendant, informed them of a writ of fieri facias at the suit of the plaintiff, having been placed in his hands to execute, by which means the issuing of a fiat in bankruptcy against the defendant was accelerated, and the plaintiff's execution thereby defeated ; the Court refused to grant the sheriff relief under the Interpleader Act. *Cox v. Balne*, 718

INQUISITION.

See CERTIORARI, 1.

IRREGULARITY.

See ESTOPPEL, 3.

REPLICATION, 7.

1. Judgment having been entered up for the defendants' costs, against
U U U D. & L.

husband and wife, in an action for a libel against the wife, in which the verdict had passed for the defendants, a ca. sa. issued against the husband alone, and afterwards a second writ of ca. sa. against both the plaintiffs. The husband having been taken in execution under the first writ, after the second had issued, was discharged therefrom by an order of the Insolvent Court, and the wife was subsequently arrested under the second writ, but discharged out of custody by a Judge's order. The Court refused on motion, to set aside the second writ, on the ground that it had been improperly issued. *Newton et ux. v. Rowe and Another*, 80

2. Where a defendant upon being arrested in 1845, upon a writ of capias issued under the 1 & 2 Vict. c. 110, s. 3, was served with a copy of a writ of summons, tested in 1840, and directed to the defendant in another county than that in which the arrest took place; and also with a copy of the writ of capias, which was without date, and directed "To the — greeting." *Held*, that the defendant was entitled to be discharged out of custody; and that he need not make it a part of the rule that the writs or the copies of the writs should be set aside.

It is not necessary in a *rulo nisi* to set aside proceedings for irregularity, to specify the grounds of irregularity on which the party relies. *Rennie v. Bruce*, 946

ISSUE.

See WRIT OF TRIAL, 3.

ISSUABLE PLEA.

1. In an action for work and labour, a plea of the defendant's coverture, at the time of the contract, is an issuable plea. *Birch v. Leake*, 88

2. Where a defendant, under terms of pleading issuably, pleads a non

JUDGE, (AUTHORITY OF).

issuable plea, the plaintiff may sign judgment, notwithstanding the plea has been objected to, and allowed by a Judge at Chambers. *Capner and Others v. Mincher, Guest, and Others*, 694

3. The declaration stated a promise to marry on request, and averred a request, with a breach, that the defendant did not marry when so requested, and that he married another person. The defendant, amongst other pleas, traversed the request: *Held*, an issuable plea. *Short v. Stone*, 792

4. In an action by indorsee against acceptors of a bill of exchange, the defendants, who were under terms to plead issuably, pleaded (amongst others) the following pleas. That after acceptance, and before indorsement, the drawer waived the acceptance, and discharged the defendants from payment thereof, of which the plaintiff had notice.

That after the bill was accepted and delivered to the drawer, he indorsed it to one of the acceptors for consideration, and that such acceptor afterwards delivered it to the plaintiff, who had notice of the facts.

Held, that the above were issuable pleas. *Steele v. Harmer, Benham and Layton*, 861

JOINT CONTRACTOR.

See PLEA, 10.

JOURNEYS (ACCOUNTS).

See WRIT OF RIGHT, 1.

JUDGE.

See AFFIDAVIT, 2, 3.

JUDGE, (AUTHORITY OF).

See INSOLVENT.
SHERIFF.

JUDGMENT, (NONSUIT).

JUDGE, (CERTIFICATE OF).

See CERTIFICATE OF JUDGE.

JUDGE, (DISCRETION OF).

See SEVERAL DEFENDANTS.

JUDGE, (LIABILITY OF).

See INSOLVENT.

SHERIFF.

JUDGE, (ORDER OF).

See AMENDMENT, 3.

Where an arrangement is made by consent of the parties to a suit, and in order to carry into effect their intentions, some act remains to be done under the authority of the Court, the Court has power, notwithstanding such previous consent, to see that such act is proper and allowable.

Therefore, where a cause stood for trial on the 7th of December, and on the 6th, the defendant consented to a Judge's order for payment of debt and costs on the 14th: but before that time he discovered fresh evidence: *Held*, that the Court might set aside the order, and let the defendant in to try the cause. *Wade v. Simeon*, 658

JUDGMENT.

See DEBT.

WARRANT OF ATTORNEY, 6.

JUDGMENT NON OBSTANTE VEREDICTO.

See COSTS, 5.

REPLICATION, 4.

JUDGMENT, (AS IN CASE OF A NONSUIT).

1. An affidavit in support of a rule for judgment as in case of a nonsuit, need not state whether the cause is a town or country cause; if it appear that issue were joined at such a period, that in neither case the

JURAT.

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motion would be premature. *Anslow v. Cooper*, 449

2. Where there are several defendants, appearing by separate attorneys, they may each move for judgment as in case of a nonsuit. *Rhodes and Another, Assignees, &c. v. Thomas and Others*, 553

3. The plaintiff having given, on the 8th of May, a peremptory undertaking to try at the sittings after Trinity Term, entered the cause for trial on the evening of the 11th of June, the last day allowed for so doing. The cause was consequently made a remanet. The plaintiff did not apply in the following Term to enlarge his peremptory undertaking, and the defendant obtained judgment as in case of a nonsuit. The Court discharged a rule nisi for setting aside the judgment. *Petrie v. Cullen*, 604

4. Where a cause was set down for trial at the sittings in Easter Term, and by consent made a remanet to the sittings after Trinity Term, when the plaintiff withdrew the record; it was held that the defendant might move for judgment as in case of a nonsuit. *M'Intyre v. Sewers*, 896

JUDICIAL NOTICE.

See HABEAS CORPUS, 3.

A writ of summons commanded the defendant to enter an appearance "at the suit of Henry Walker & Co.;" and that in default, &c., "the said Henry Walker & Co. may cause an appearance to be entered for you." It was indorsed "the plaintiff claims," &c.: *Held*, that the writ was regular, as the Court could not judicially take cognizance that "Walker & Co." was not the name which the plaintiff bore. *Walker & Co. v. Parkins*, 982

JURAT.

See AFFIDAVIT, 2, 3.

CERTIORARI, 2.

TAXATION, 3.

U U U 2

The jurat of an affidavit, which stated the affidavit to have been sworn at the Judge's Chambers in the county of Middlesex, was held sufficient by the Court. *Hemsworth v. Brian*, 844

JURORS.

Where a rule for a new trial is drawn up on reading affidavits imputing personal misconduct and partiality to some of the jurymen, affidavits of such jurymen denying and explaining the conduct attributed to them, may be read on shewing cause against the rule. *Standewick v. Hopkins*, 502

JURY.

See AFFIDAVITS, (Using), 2.
INDICTMENT.

JUSTIFICATION.

See COSTS, 3.

LACHES.

See TAXATION, 10.

WARRANT OF ATTORNEY, 3, 4.

1. Where a notice to plead omitted to state in how many days the defendant was to plead, and the plaintiff signed judgment for want of a plea; the Court refused to set aside the judgment for irregularity, the defendant having allowed eighteen days to elapse between the service of the notice, and the date of his application to the Court. *Ramm v. Duncomb*, 88

2. A writ of trial was tested on the 14th of February, returnable the 16th of January next. Notice of trial was given for the 16th of February, on which day the cause was made a remanet. The plaintiff then resealed the writ of trial, and inserted the 21st of February, as the return day. The cause on that day was called on, and a verdict taken for the plaintiff; the defendant retiring from the Court, and

refusing to take any part in proceedings. The issue delivered by the plaintiff did not correspond to the writ of trial, either in the teste or return: *Held*, that the alteration and variances were irregularities, and that the defendant was bound to come promptly to take advantage of them. *v. Stannaway*,

3. An irregular execution against the defendant was levied on the 7th of March. The sale took place on the 7th of March, and thirteen days. On the 14th of March the defendant in bankruptcy was struck off the books. The defendant, and notice thereof, was given on the 12th of March. On the 13th of April, the sheriff claimed the proceeds of the sale. On the 25th, a rule was made on the 25th, a rule was made on their behalf to set aside the judgment and execution for irregularity. Judgment roll was not carried on the 19th of April: *Held*, that the motion was not too late. *Another v. Hodson*,

4. In an action upon a declaration of special and an indebitatus, both of which the evidence applied. After verdict for the plaintiffs, the Judge who tried the case directed that the verdict entered for the plaintiffs special, and for the defendant the indebitatus count. The defendant brought by the defendant's counsel entered up for the special count was reversed by the Court of Exchequer Chamber, 15th of February, 1842. *ber*, 1844, the plaintiffs

LEGACY DUTY.

amend the *postea* by entering up judgment for them on the *indebitatus* instead of on the special count: *Held*, that assuming the Court to have jurisdiction, the application was too late.

Semble, that the Court out of which a record issues has no power to amend the record after the judgment of a Court of error. *Jackson and Another v. Galloway*, 839

5. Where an order of a Judge to set aside a writ of summons served on the 4th of April, was made a rule of Court on the 15th of April, the first day of Term, and on the same day a notice was served on the defendant's attorney, that the plaintiff intended to apply to the Court to rescind the Judge's order, as soon as counsel could be heard, and, accordingly, a rule *nisi* was moved for and obtained on the 23rd: *Held*, that the application was sufficiently in time. *Walker & Co. v. Parkins*, 982

LANDLORD AND TENANT.

See PLEA, 9, 33.

RESTITUTION, (WRIT OF).

On return to a *habeas corpus*, it appeared that the prisoner was in custody by virtue of a warrant of commitment on an adjudication of two magistrates, on a complaint in writing, under the 11 Geo. 2, c. 19, sec. 4, for fraudulent removal of goods; but it no where appeared, on the face of the adjudication, or of the commitment, that the complaint, in respect of which the magistrates proceeded, was made in writing by the landlord, his bailiff, servant, or agent: *Held*, a fatal defect, and that the prisoner was entitled to be discharged. *Regina v. Fuller*, 98

LEGACY DUTY.

See ARBITRATION, 1.

MANDAMUS. 1029

LEVY.

See POUNDAGE.

LIBEL.

See COSTS, 3.

PLEA, 12.

PRISONER, 10.

LIMITATIONS, (STATUTE OF).

See AMENDMENT, 1.

PLEA, 29.

On motion in arrest of judgment: *Held*, that a replication to a plea of the Statute of Limitations, that the plaintiff at the time the cause of action accrued, was in parts beyond the seas, and is and still resides in parts beyond the seas, is good. *Le Vaux v. Berkeley*, 81

LOTTERY.

See INDORSEMENT, (ON PROCESS).

LUNATIC.

See DISTRINGAS, 1, 4.

Where an order for the removal of a pauper lunatic to the county asylum, under the 9 Geo. 4, c. 40, sec. 38, had been made by two justices of a borough, and the pauper was confined under it in the county lunatic asylum, an order of two justices of the county adjudicating upon the settlement of such pauper, and ordering the payment of expenses under sec. 42, was held bad. *Regina v. The Justices of Cornwall*. (*Penryn v. Falmouth*), 775

MAGISTRATE.

See PRISONER, 1.

MANDAMUS.

See QUARTER SESSIONS.

1. A party having been convicted before two justices under the 17 Geo. 3, c. 56, sec. 8, entered into a recog-

nizance, and gave notice of appeal to the quarter sessions, under sect. 20. He afterwards abandoned his notice of appeal. At the sessions, the respondents applied to be permitted to enter the appeal; and also to have their costs allowed them which had been incurred by the appellant's not giving the usual notice of abandonment required by the rules of the sessions: *Held*, on motion for a mandamus, that the recorder had acted properly in refusing both these applications.

Semble, that where a party had been convicted under the above statute, and having entered into a recognizance to appeal, had not been imprisoned, but afterwards had abandoned his appeal, the magistrates might proceed to enforce the original conviction against him. *Regina v. The Recorder of Bolton*, 510

2. A mandamus will not lie to compel the vicar, churchwardens, and parishioners of a parish, to meet for the purpose of electing an organist to the parish church; although within the time of living memory, there has always been an organist who has been paid a stipend out of the church rates.

At a vestry meeting convened for the purpose of electing an organist, it was unanimously agreed that the course pursued on a former vacancy should be followed, namely, that a committee of the vestry should select six out of the candidates, who should perform in the parish church each on a separate Sunday, and that one of those six should be elected to the office; but that no vote given for any other than one of the six candidates should be received: *Held*, that this mode of proceeding was not unreasonable, and that the Court would not grant a mandamus to admit to the office a person in whose favour the greatest number of votes had been tendered, but who was not one of the six candidates. *Ex parte Le Cren*, 571

3. Where the Court for the relief of Insolvent Debtors, under the 56th sec. of 1 & 2 Vict. c. 110, had made an order for the payment of a certain portion of an insolvent's pension to his assignees, and had required the commissioners of excise, by whom it was payable, to consent to such order who had refused to do so. This Court declined to grant a mandamus to the commissioners of excise, compelling their consent. *In re Philip Heward* 75:

MASTERS' DISCRETION.

See TAXATION, 4, 5.

MESNE PROFITS.

Where a plaintiff succeeds in ejectment, and the costs are taxed, he cannot, in an action for mesne profits recover more than such taxed costs notwithstanding the taxation took place at the instance of the defendant *Doe v. Filbiter*, 18:

MONEY HAD AND RECEIVED

See COUNTS (JOINDER OF).
EXECUTOR, 2.
TROVER.

The plaintiff assigned to the defendants, by deed, a debt due to him upon trust, first, to pay the costs and charges of the trust itself; secondly to pay money due from the plaintiff to a Banking Company, not exceeding 500*l.*; thirdly, to pay the surplus if any, to the plaintiff. The defendants having received 758*l.* under this deed, the plaintiff brought the present action for money had and received to his use. There was no proof of any account stated, nor of the precise amount to which the plaintiff would be entitled.

Held, first, that money had and received would not lie against the defendants, as the trust was still open.

NON-PROS.

Secondly, that the defendants might avail themselves of the defence that the contract was by deed, under the general issue.

The proper form of action in such a case is covenant upon the deed ; per *Cresswell, J. Edwards v. Bates and Another*, 299

MUTUAL CREDIT.

See PLEA, 24.

NAVIGATION LAW.

See PLEA, 6.

NEGOTIABLE INSTRUMENT.

See PLEA, 22.

NEW ASSIGNMENT.

See REPLICATION, 2.

NEW TRIAL.

See COSTS, 1.

WRIT OF TRIAL, 5.

The Court cannot on motion grant a new trial as to one defendant, where a verdict has been found against him, and for the other defendants. *Doe dem. Dudgeon and Another v. Martin, Chapman and Others*, 678

NON ACCEPIT.

See PLEA, 18.

NON-ASSUMPSIT.

See ARBITRATION, 9.

NON-CONCESSIT.

See PLEA, 7.

PLEAS (SEVERAL), 2.

NON-PROS.

See PRISONER, 2.

NUL TIEL RECORD. 1031

NOT GUILTY.

See PLEA, 15.

NOTICE.

See ARBITRATION, 19.

NOTICE OF ACTION.

A notice of action to a constable under the 1 & 2 Wm. 4, c. 41, stated that the plaintiff would proceed for false imprisonment committed by the defendant ; in "imprisoning the plaintiff at St. Asaph, on the 30th of January, on a charge of felony, and taking him from thence in custody to Denbigh, and detaining him in custody upon the charge for twelve hours ; and also for causing him to be taken before certain justices at Denbigh on the 31st of January, on the said charge : " *Held*, sufficient. *Jones v. Nicholls*, 425

NOTICE (OF APPEAL).

A notice of appeal against an order of removal of a pauper may be given, after the twenty-one days from the time of sending the notice of chargeability, &c., required by the 4 & 5 Wm. 4, c. 76, s. 79, and before an actual removal. *Regina v. The Justices of the West Riding of Yorkshire, (Stanley cum Wrenthorpe v. Alverthorpe with Thomas)*, 488

NOTICE (OF OBJECTION TO PATENT).

See PATENT.

NUL TIEL RECORD.

Where a defendant pleads nul tiel record, no rule for judgment for the plaintiff is necessary.

Upon issue joined on plea of nul tiel record, the declaration stated generally the recovery of a judgment ; but the record produced shewed the

judgment to have been signed by reason of default in payment of a debt by instalments as directed by a Judge's order: *Held*, no variance.

Semble, that where the plaintiff declares on a judgment, the Court will, at the instance of the defendant, stay proceedings until the roll is carried in. *Hopkins v. Francis*, 664

NULLITY.

See WARRANT OF ATTORNEY, 6.

ORGANIST.

See MANDAMUS, 2.

OUTLAW.

See WARRANT OF ATTORNEY, 9.

OUTLAWRY.

See SHERIFF (RETURN OF).

Where in proceedings to outlawry the writ of proclamations commanded the sheriff to proclaim the defendant on three several days, "according to the form of the statutes for such purpose made, in the 31st year of the reign of Elizabeth, late Queen of England, and the 1st and 2nd years of the reign of her Majesty Queen Victoria, one of such proclamations to be made at or near the most usual church door of the parish," &c. ; and the sheriff returned that he had proclaimed the defendant "at the most usual door of the church of the parish of," &c. : *Held*, that the Court would not set aside these proceedings for irregularity, where the defendant had obtained a previous rule for the same purpose, which had been discharged ; although the objections now taken were different : but would leave the defendant to his writ of error. *Stultz and Another v. Wyatt*, 560

PATENT.

OYER.

See SECURITY FOR COSTS.

PALACE COURT.

See DECLARATION.

PAPER BOOKS.

See ARGUMENT.

PARTNER.

See PAYMENT.

In an action for work done by A. and B., who were partners at the time that the cause of action accrued, the defendant put in a letter written by C., who was not a partner, in which the transaction became a partnership between B. in the room of A., admitting that the plaintiffs had given another party: *Held* inadmissible without proof that C. had been admitted from B. to make the partnership. *Tunley and Hodson v. Evans*

PARTNERSHIP.

See ARBITRATION,
CONTRIBUTION.

PARTICULARS

See STAY OF PROCEEDINGS.

In an action for goods sold, particulars of demand stated to be brought "to recover the sum of 37*l.*, the balance of an account of 108*l.*," (giving no credit for specific sums.) The defendant pleaded as to 5*l.*, parcel, &c. a set-off amount: *Held*, that it was not for the jury to say, whether the balance claimed meant a balance giving credit for the 5*l.* *Townson v. Jackson*,

PATENT.

See PLEA, 7, 8, 34.

PLEAS (SEVERAL)

In an action for the infringement

PAYMENT (INTO COURT).

a patent, the notices of objection were, first; that the patentee did not, by the specification, sufficiently describe the nature of the invention; secondly, that he had not caused any specification sufficiently describing the nature of the invention to be enrolled: *Held*, that the last objection was not sufficiently precise. *Leaf v. Topham and Another*, 863

PAUPER.

See LUNATIC.

1. After verdict for the plaintiff, and a rule absolute for a new trial obtained, the Court granted a rule to admit the plaintiff to sue in formâ pauperis. *Hall v. Ives*, 610

2. A plaintiff suing in formâ pauperis, who is desirous of amending his pleadings, is not entitled to do so as a matter of right, without payment of costs. *Foster v. The Governor and Company of the Bank of England*, 790

PAYMENT.

See PLEA, 2.

Interlocutory judgment for want of a plea having been set aside with costs at the instance of one of two defendants, who appeared separately, in an action against both for use and occupation; payment of the costs to the other defendant, who gave a receipt in the action for himself and partner, was held insufficient; although there was nothing apparent on the face of the order to shew that it was made at the instance of one only of the defendants. *Showler v. Stoakes and Another*, 2

PAYMENT (INTO COURT).

Trespass for breaking and entering plaintiff's house, and assaulting and beating his son: *Held*, that the defendants might pay money into Court under a Judge's order by virtue of 3 & 4 Wm. 4, c. 42, s. 21. *Newton v. Holford and Others*, 554

PLEA.

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PEER.

See DISTINGUAS, 2.

PEACE OFFICER.

See HABEAS CORPUS, 3.

PENAL ACTION.

An action under the 1 & 2 Ph. and Mary, c. 12, s. 2, by the party aggrieved, is not a penal action within the 31 Eliz. c. 5, s. 2, or 21 Jac. 1, c. 4, s. 2, so as to require the venue to be local.

The declaration should state the offence to be, contra formam statuti; and it is not sufficient to allege facts which would bring the defendant within the statute, and that "by means thereof, and by force of the statute," an action hath accrued to the plaintiff. *Fife v. Bousfield*, 481

PLEA.

1. Assumpsit against acceptor of a bill of exchange, stating an indorsement by S. the drawer, to one R., and by R. to the plaintiff.

The defendant pleaded, sixthly, in effect, that he accepted the bill in question for the accommodation of S., the drawer, to enable him to deposit it with R., as a collateral security for a debt due to R., from S.; that R. took it on those terms; that S., before the bill became due, paid R. part of that debt, and tendered the residue; that R. refused to receive the money tendered, kept the bill, and indorsed it to the plaintiff as a mere trustee, R. and the plaintiff conspiring and colluding to cheat the defendant; *Held*, on demurrer, that *de injuriâ* was a good replication to this plea, and that the plea contained merely matter of excuse.

The defendant pleaded, seventhly, in effect, that the plaintiff had been twice bankrupt, and obtained his certificate each time, but that his estate

under the second bankruptcy had not paid 15s. in the pound, and that the bill was indorsed to him after his second certificate: *Held*, good by the Court of Queen's Bench on special demurrer.

Held, bad, by the Court of Exchequer Chamber reversing the judgment in B. R., because it did not state that the assignees had interfered, or required the defendant to pay the amount to them.

The plea stated, that plaintiff became and was a bankrupt; but did not state any act of bankruptcy, on which the commission or fiat was founded: *Held*, sufficient, on special demurrer, by the Court of Queen's Bench. *Herbert v. Sayer*, 49, 57, 64.

2. In debt on an indenture of demise for 191l. 5s., two years and a half's rent, the defendant pleaded as to 40l. 10s., parcel, &c., that before the premises were demised by the plaintiff to the defendant, the plaintiff had conveyed a moiety thereof to E. B., in fee; that the plaintiff was in possession of the said moiety of the premises up to the time of the demise; that after the commencement of the suit, the devisees of E. B. gave notice to the defendant of the conveyance to their testator, and demanded payment of a just proportion of the rent reserved, and threatened the defendant, in case of non-payment, to eject him, and put the law in force; that 40l. 10s. was the sum due on a just apportionment of the rent reserved, in respect of the said moiety of the premises, and that if defendant had not paid it to the devisees of E. B., they would have ejected him; wherefore the defendant paid them the same: *Held*, upon demurrer, that the plea was bad, as a plea of eviction, the demand of payment by the devisees not having taken place, till after the rent became due; and bad as a plea of payment, the payment not having been made to the plaintiff, nor by her authority, and

there being no debt due by the plaintiff to the devisees, nor any incumbrance upon which the defendant was discharged. *Boodle v. C.*

3. In detinue on a covenant, a plea traversing the covenant is bad on demurrer. *Harrison*,

4. To assumpsit for breach of contract in not returning promissory notes, the defendant pleaded that after breach, he delivered the plaintiff at his request, and on account of the said notes, the promise and damage thereof;" an order in writ to B., in whose hands the notes whereby the defendant refused to deliver to plaintiff the notes that plaintiff took the order on account of the notes, promise and damages;" always ready to deliver plaintiff upon the order presented to him, but that he did not present the same within a reasonable time, but kept the notes, making any application to the notes, until the same were by any default of the defendant's possession stolen from the possession. *Held*, on special demurrer of accord and satisfaction. *Owen*,

5. In an action on a policy of insurance, the declaration stated that the policy was made by the plaintiff's agents, on account, and for his benefit J. & Co. received the order effected the policy as usual. *Held*, on special demurrer, traversing this averment amounting to the general issue. *mond v. Smith and Another*

6. The defendants pleaded that the master of the vessel that policy was effected entered into an agreement with the seamen, pursuant

5 & 6 Wm. 4, c. 19, s. 2, wherefore the voyage was illegal: *Held*, on general demurrer, that the plea was ill, as the non-compliance with the statute by the master, did not make the voyage itself illegal, or the vessel unseaworthy. *Redmond v. Smith and Another*, 280

7. A declaration in an action for the infringement of a patent, made profert of the letters patent, not setting them out verbatim. The defendant, being under terms to plead issuably, pleaded non concessit: *Held*, on motion, that the plea was issuable.

Semble, that the plea of non concessit, under such circumstances, would be good on demurrer. *Bedells and Another v. Massey*, 322

8. The defendant also pleaded that the plaintiffs had represented to the Queen, that their invention was an improvement; that the letters patent were granted on such representation; that such representation was untrue, and that the Queen was deceived; and that the invention was not an improvement; *Held*, that this plea was not the same as a plea that the invention was of no use to the public: *Held*, also, that such a plea was sufficiently described in the abstract of pleas, as a plea that the invention was no improvement. *Ib.*

9. To trespass de bonis asportatis, the defendant pleaded, that before the said time when, &c., to wit, on the 25th of June, 1843, the defendant being seised of a messuage, demised the same to R. for a certain term, to wit, a term of three years, commencing from the 24th of June in that year, at a certain yearly rent; that before the said time when, &c., and during the said demise, and the term thereof granted, to wit, on the 25th of December, 1843, a certain sum of the rent aforesaid for a certain term, to wit, a quarter of a year of the said tenancy, ending on the day and year last aforesaid, became due, and at the said time, when, &c. remained in

arrears; whereupon the defendant, at the said time when, &c., entered and distrained for the said arrears of rent: *Held*, on special demurrer, that the plea was bad, for not specifically stating that the tenancy existed at the time of the distress.

Quære, if the demise were well stated? *Drew v. Avery and Another*, 371

10. To debt for goods sold, &c., the defendant pleaded, in bar, that the goods were sold to him jointly with one S., and not to the defendant alone, and were to be paid for by the defendant and S., and not by the defendant alone; that the plaintiff sued S. for the same debt, and recovered judgment; concluding with a verification: *Held*, on special demurrer, that a judgment recovered against one of two joint contractors is a good bar to an action against the other, though no execution has issued: *Held* also, that it sufficiently appeared that the debt was not joint and several; that the matter was properly pleaded in bar, and not in abatement; that the plea did not amount to the general issue; and that it need not conclude with prout patet per recordum. *King and Another v. Hoare*, 382

11. Assumpsit; that in consideration that the plaintiff being an attorney, practising in the Insolvent Court, would take the necessary steps to procure the defendant's discharge under the Insolvent Act, the defendant promised to pay him his taxed costs. Averment, that he did take the necessary steps, and that his costs were afterwards "taxed by the Court for the relief of Insolvent Debtors" at a certain sum. Breach, non payment. *Held*, bad on demurrer; for not averring a taxation by a competent authority. *Morgan v. West*, 391

12. A declaration alleged that the defendant published the following libellous matter, of and concerning the plaintiff, as a schoolmaster: "During

the last seven years no boys have received instructions at the school. The decay of this school seems mainly attributable to the violent conduct of the master. His treatment of two boys on two separate occasions subjected his modes of punishment to investigation before the magistrates, one boy having been subsequently confined to his bed under surgical advice for a fortnight." The defendant pleaded as to so much of the libel as imputed to the plaintiff, that during the last seven years, no boys had received instructions at the school of the plaintiff, and that the plaintiff's conduct as master of the said school had been violent, and that the plaintiff's treatment of a boy on one occasion subjected his, plaintiff's mode of punishment, to investigation before the magistrates; that for seven years, no boys had received instructions at the plaintiff's school, and that on divers days and times he violently chastised certain scholars, and, on one occasion, so illtreated a scholar, that his mode of punishment was investigated before a magistrate: *Held*, on special demurrer, that the libel was not divisible; and that the plea was bad, for not shewing that the loss of scholars was occasioned by the plaintiff's violent conduct. *Smith v. Parker*,

394

13. A declaration stated that one J. was indebted to the plaintiff in 17*l.* 11*s.*, and thereupon, in consideration that the plaintiff would, for and on account of the said sum, accept the joint and several promissory notes of J. and one E. for payment of 17*l.* 11*s.*, six months after date, and would thereby give time to J. for payment of the said debt; the defendant promised to pay the sum of 17*l.* 11*s.*, if the said promissory note were not duly honoured and paid. It then averred the acceptance of the note, and the non-payment of it when due, although the said J. and E. were

afterwards requested a notice of the premises; and alleged for breach of the said promise the non-payment of 17*l.* 11*s.* by J. and E. The plea traversed to J. and E.: *Held*, that the plea was bad.

The giving a bill "in account" of a debt is, by agreement, a forbearance of the debt, until *t. Walton v. Maskell*,

14. A declaration by a drawer or indorser of an exchange must allege that it was made in parts beyond the jurisdiction; and therefore, where the defendant denied such allegation, and pleaded "that he did not assent to the said inland bill:" *Held*, on demurrer, that the plea was bad.

Quere, if the indorser of an exchange be estopped by the drawing, or previous assignment? *Armani v. Castri*

15. Case. That before the defendant, by his pleading, admitting the grievances, and the defendant carried on business at a messuage situate, and possessed of a lease of the said messuage, and of certain utensils of trade therein, that thereupon the plaintiff requested the defendant, to let the defendant to buy the said business, and the fixtures, and the furniture, and the defendant, by falsely and fraudulently pretending, and that the net profits of the said business amounted to, &c., sold the said business, and the fixtures, and the furniture, to the plaintiff, and then paid for the same the sum of 100*l.*; whereas, in truth, the net profits of the business amounted to a much less sum, to wit, &c. *Pleas* *Held*, after verdict, that the defendant's pleadings, averring the fact of the representation made, as well as its falsity, were bad. *v. Paul*,

16. The plaintiff declared upon a breach of contract by which the defendant had agreed to allow her 600*l.* a-year for her maintenance and instruction, until he should require her services as a governess of his children. The defendant pleaded that he entered into the promise and agreement in the belief, and on the representation by the plaintiff, that she was an honest and moral person, and a fit and proper person for the said situation; that before any breach of the promise, the defendant discovered that the plaintiff had become and was an immoral and dishonest person, and wholly unfit and improper for the said situation, and a person whom it would have been very improper and wrong for the defendant to employ as governess of his children; and that he therefore rescinded the contract, and gave her notice thereof: *Held*, upon special demurrer, that the plea was bad, as being too general and uncertain. *Burgess v. Beaumont*, 590

17. In assumpsit for work and labour, the defendant pleaded, that before action brought, he duly presented a petition for protection from process to the Court of Bankruptcy, under the stat. 5 & 6 Vict. c. 116, whereupon all his estate and effects vested in W., the official assignee; and that after the commencement of the suit, the commissioner made a final order for the protection of the person of the defendant from all process, and for vesting his estate and effects in the said W., the official assignee: *Held*, on special demurrer, that it was not necessary to allege that the defendant had given notice to his creditors of his intention to present a petition, pursuant to stat. 5 & 6 Vict. c. 116, sec. 1; but that the plea ought to shew that the final order was a final order for "distribution," as well as for "protection." *Nichols v. Payne*, 629

18. An alteration in a bill of ex-

change, which does not render a new stamp necessary, cannot be given in evidence under the plea of non acceptit; but the fact must be specially pleaded. *Parry v. Nicholson*, 640

19. To assumpsit by indorsee against acceptor of a bill of exchange, the defendant pleaded that she delivered the bill to C. for a special purpose, and that C., in violation of good faith, and contrary to the said special purpose, delivered the bill to the plaintiff; that the plaintiff, at the time of the delivery, had notice of the premises; and that there was no consideration for the indorsement to the plaintiff: *Held* bad, for duplicity. *Leaf v. Robson*, 646

20. A plea of the defendant's discharge from a debt, under the 5 & 6 Vict. c. 116, must either follow strictly the words of the 10th section, or set out the proceedings at length, *Ib.*

21. To detain for title deeds, the defendant pleaded a devise of certain messuages to which the deeds related; and set out the will in hæc verba. On the face of it, it appeared doubtful whether the messuages in question were those which the testatrix meant to devise: *Held*, on special demurrer, that the plea was bad, for not setting out the will according to its legal effect. *Robertson v. Showler*, 687

22. A plea of the delivery of a bill of exchange or promissory note, "for and on account" of the debt for which the plaintiff sues, must shew, upon the face of it, that it was a negotiable instrument, in which the plaintiff took an interest; and if it omit to do so, the defect will not be cured by verdict. *James v. Williams*, 713

23. Trespass quare clausum fregit. The declaration contained two counts, the second of which charged the trespass on other days and times, and on other parts of the closes in the first count mentioned. The defendant pleaded a right of way over the closes in the declaration mentioned. The

plaintiff traversed the right of way, and new assigned. To the new assignment, there was a payment of money into Court, and acceptance of it: *Held*, that the plea justified all the trespasses in the declaration; and that the defendant, therefore, was not bound to prove two rights of way. *Wood v. Wedgwood*, 809

24. To an action by the assignees of a bankrupt for money had and received to their use, as assignees, the defendant pleaded as to 120*l.* &c., that before notice of an act of bankruptcy, and before fiat, he gave credit to the bankrupt by accepting a bill of exchange for 148*l.* 10*s.* for his accommodation, which bill the bankrupt negotiated before notice of any act of bankruptcy, and that the credit so given was of a nature extremely likely to end in a debt; and that afterwards and before the commencement of this action the defendant was obliged to pay the amount of the said bill to the holders; and that before notice, and before fiat, the bankrupt delivered to the defendant certain bills of exchange amounting to 120*l.*, the sum mentioned in the introductory part of the plea, to receive the amount of the same on behalf of him the bankrupt; and that after the bankruptcy, but before the fiat, the defendant received the amount of the same; and that defendant is willing to set-off and allow out of the sum of 148*l.* 10*s.*, the damages sustained by the non-performance of defendant's promises as to 120*l.*, &c.: *Held*, on special demurrer, that the money received by the defendant after the bankruptcy, was properly declared for, as money received to the use of the assignees; that the plea shewed such a mutual credit between the bankrupt and the defendant under the 6 Geo. 4, c. 16, sec. 50, as entitled the defendant to plead it by way of set-off under that section in an action by the assignees; that the plea sufficiently confessed

and avoided the receipt of the money to the use of the plaintiffs as assignees; and that it did not amount to a circuitous plea of the general issue. *Thomas Bittleston and John Dillon, Assignees of William Timmis, a Bankrupt, v. John Timmis*, 817

25. To trover for certain goods, the defendant pleaded that D., A., & Co. were the factors and agents of the plaintiffs, and as such factors and agents had a lien on the goods; that the plaintiffs consigned them to D., A., & Co. as such factors and agents; that they were intrusted as such factors and agents, with the dock warrants for the delivery of the goods; that being so intrusted with the dock warrants, they pledged the goods to the defendant; and that being so intrusted with the dock warrants, they delivered them to the defendant upon such pledge; and that the defendant had not notice at the time of the pledge, that the said D., A., & Co. were not the bonâ fide proprietors of the goods. The plaintiffs replied that D., A., & Co. were not intrusted with the warrants modo et formâ: *Held*, on demurrer to the replication, that the plea did not sufficiently show a pledge by delivery of the goods; but only a symbolical pledge by delivery of the warrants: and, therefore, contained no sufficient answer to the declaration. *Bonsi and Another v. Stewart*, 836

26. To an action on a promissory note, the defendant pleaded that he made the note through, and by means of the fraud, covin, and misrepresentation of the plaintiff. Replication, that defendant did not make the note through the fraud, covin, and misrepresentation of the plaintiff: *Held* bad on special demurrer. *Seemle*, that the plea was bad, for not stating the circumstances of the fraud or misrepresentation. *Robson v. Luscombe*, 855

27. To an action on a promissory

note, the defendant pleaded, that after the 5 & 6 Vict. c. 116, came into operation, and before the 7 & 8 Vict. c. 96, a petition for protection from process was by him duly presented, and a final order for protection and distribution made by a commissioner duly authorized; and that the debts in the declaration were contracted before the filing of the petition: *Held* bad, on special demurrer. *Fisher v. Gibbon*, 869

28. In an action against an executor on a check drawn by his testator, the defendant may plead non assumpsit. *Rolleston v. Dixon, Executor of Dixon*, 892

29. A declaration on a promissory note payable more than six years ago, averred part payment within six years. A plea traversing such averment was held bad on special demurrer. *Hodkins v. Cook, Executrix of A. Cook*, 894

30. Assumpsit by a domestic servant for discharging her without a month's notice or a month's wages. Plea, that the plaintiff requested the defendant to give her leave to absent herself from his dwelling-house during the night; that the defendant refused such leave, and the plaintiff, against his will, absented herself. Replication, that the mother of the plaintiff was seized with sudden and violent sickness, and believing herself in imminent peril of death, had requested the plaintiff to visit her; whereupon the plaintiff requested the defendant to allow her to absent herself from his dwelling-house until the following day, for the purpose of enabling her to visit her mother in her said sickness; and because the defendant, without any reasonable cause, refused such assent, the plaintiff, for the purpose of visiting her mother, left the dwelling-house of the defendant, as in the plea mentioned: *Held*, on special demurrer, that the plea was good, and

the replication bad. *Turner v. Mason*, 898

31. To trover for twenty tons of hay, &c., the defendant pleaded that one B. was possessed of three undivided fourth parts in the said goods, and being so possessed, delivered the same to R., to be by him kept for B.: that R. delivered the goods to the plaintiff; whereupon the defendant, as servant of B., and by his command, seized and took the said goods.

Replication, so far as the plea relates to seven tons of hay, &c., portion of the goods in the declaration mentioned the plaintiff, admitting that the defendant, as the servant of B., converted the *said last mentioned goods* as in the plea alleged; yet saith that B. was not possessed of three undivided fourth parts in the *said last mentioned goods*, modo et formâ, &c.

Replication, so far as the plea relates to seven tons of hay, &c., other portion of the goods in the declaration mentioned, the plaintiff, admitting that B. was possessed of three undivided fourth parts in the goods and chattels last aforesaid; yet saith that defendant, of his own wrong, &c., converted the *said last mentioned goods*. On special demurrer to the replications: *Held*, first, that the plea was good: secondly, that the replications were bad, inasmuch as the words "last mentioned goods" referred to all the goods in the declaration. *Aston v. Brevitt*, 903

32. To trespass for breaking and entering the plaintiff's dwelling-house, and removing his goods; the defendants pleaded, that after the 1 & 2 Vict. c. 74, C., as agent of M. made his complaint in writing before justices acting for the district of R. wherein the premises thereafter mentioned were situate, and stated, that M. let to the plaintiff a tenement from year to year, under the rent of 4s., that the tenancy was determined by notice to quit, and that C., as such agent, served on the

plaintiff a notice of his intention to recover possession of the said tenement, a duplicate of which notice was served on the wife of the plaintiff on the premises, and read over and explained to her. The plea then set out the notice, and alleged that the justices duly issued their warrant, directed to the defendants and all other constables and peace officers acting for the several parishes within the hundred of R., and thereby authorized and commanded the defendants, and said other constables and peace officers, to enter on the said tenement, and deliver possession thereof to C. as such agent. The plea then proceeded to justify the breaking and entering the premises, and removing the goods by virtue of the said warrant: *Held*, that the plea was bad, and that the defendants who acted in obedience to the warrant were not protected by the 24 Geo. 2. c. 44. *James v. Chapman and Others*, 907

33. In an action of debt for use and occupation, the defendant may shew, under the general issue that J. S. had recovered a judgment in ejectment for the premises, and that to avoid being turned out of possession, he had attorned and paid the rent subsequently accruing due to J. S.: but he cannot, with respect to the rent previously due, set up as a defence under this plea, that he has paid it to J. S. *Newport v. Hardy*, 921

34. In an action for the infringement of a patent, the declaration alleged that the patentee, within six months of the date of the letters patent in pursuance of the proviso within the said letters patent contained, did, by an instrument in writing, &c., particularly describe and ascertain the nature of his invention, and cause the same to be duly enrolled. The defendant pleaded that the patentee "did not particularly describe and ascertain the nature of the said alleged invention, and in what manner the same was to

be performed, according to the tenor of the said letters patent;" concluding with a verification: *Held*, upon demurrer, that although it did appear on the face of the declaration that the six months from the date of the letters patent had elapsed, yet the averment in the declaration was material one; and that the plea, in substance, the same as if it had denied the averment modo et cetera, and, therefore, ought to have been allowed to the country. *Bentley v. Thorp and Another*,

PLEA (DISTRIBUTABLE)

See ARBITRATION, 9.

PLEAS (SEVERAL).

See PLEA, 8.

1. In trespass for criminal damage, the Court allowed the defendant to plead, "that the plaintiff, at the time of the trespass, had renounced all comfort and fellowship of his and had finally separated himself from, and was living apart from, her." *Harvey v. Watson*,

2. In an action by the assignee of a patent for its infringement, the defendant allowed the defendant to plead *concessit*, and a traverse of the assignment, together with other pleas.

Where an action is brought by the assignee of the Court of Chancery, it is no ground for disallowing pleas, that the assignee raises issues upon matters not decided in that Court; and per *Rolfe*, B. though in violation of a positive rule of law between the parties. *Bentley v. Smith*,

POUNDAGE.

A. being informed that a writ *fi. fa.*, was in the sheriff's hands against him, sent a party to the sheriff's officer, to whom the warrant had been delivered, v

bank post bill, and some country notes to an amount, sufficient, as he thought, to discharge the execution. On inquiry, however, the amount not being sufficient, the party returned to fetch the balance, leaving the bill and notes on the table; and in his absence, the sheriff's officer levied on the money so left in his hands, and claimed poundage thereon, which was paid under protest: *Held*, that this was a colourable levy; that the sheriff was not entitled to poundage; and that the Court would order him to refund the sum he had so received. *Brun v. Hutchinson*, 43

PRESUMPTION.

See ARBITRATION, 6.

EXECUTOR, 2.

REPLICATION, 7.

PRINCIPAL AND AGENT.

See MONEY HAD AND RECEIVED.

PLEA, 25.

REPLICATION, 3.

PRISONER.

See HABEAS CORPUS.

INSOLVENT.

IRREGULARITY.

LANDLORD AND TENANT.

1. W. J. was charged before two magistrates, for having, as servant in husbandry to T. R. G., and whilst under contract to serve the said T. R. G., in the business of husbandry, "purloined a quantity of barley to give to the horses under his care, contrary to his master's express commands." The evidence, as stated in the conviction, showed it to have been taken out of the granary by night, by means of a skeleton key. The magistrates proceeding under the 4 Geo. 4, c. 34, ordered him to be imprisoned, and his wages to be abated during the imprisonment. *Held*, that the offence charged was

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not one over which they had jurisdiction by virtue of that act. *Ex parte Jacklin*, 103

2. A defendant in custody by virtue of a *capias* issued by order of a Judge, is not entitled to be discharged, by reason of the plaintiff not having declared against him within a year: but the proper course is to proceed by judgment of non pros. *Turner v. Parker*, 444

3. A defendant sued for a debt under 20*l.*, consented to a Judge's order for payment of debt and costs, and, in default, the plaintiff to be at liberty to sign judgment. Some instalments were paid; but the defendant having afterwards made default, the plaintiff signed judgment for the sum due and costs (which exceeded 20*l.*), and brought an action on the judgment: *Held*, that the Court had no power to interfere, under the 7 & 8 Vict. c. 96. *Hopkins v. Freeman*, 447

4. Where an action of debt was brought under the 3 & 4 Wm. 4, c. 15, s. 2, to recover the penalty of 40*s.*, for each of six several representations of a dramatic piece, of which the plaintiff was the author; and judgment was signed by default for 12*l.* debt, and 10*l.* 15*s.* costs; and the defendant was taken in execution under a *ca. sa.*, indorsed to levy those sums: *Held*, that he was entitled to be discharged, under the 7 & 8 Vict. c. 96, s. 57; and that the action was one "for the recovery of a debt," within the meaning of that section. *Fitzball v. Brooke*, 477

5. Where the plaintiff had signed judgment for want of a plea against the defendant, who was in custody on a writ of *capias*, issued under the 1 & 2 Vict. c. 110, s. 3; *Held*, that this was a final judgment within the meaning of Reg. Gen., H. T., 2 Wm. 4, r. 85, notwithstanding that the plaintiff had not carried in the roll, or proceeded to tax his costs; and that the plaintiff

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was therefore bound to charge the defendant in execution within two Terms after such judgment. *Walker v. De Richement*, 507

6. It is not necessary to wait till the rising of the Court to move the discharge of a prisoner out of custody, on a return to a habeas corpus, where no notice of any opposition to the motion has been given. The Court will order him to be discharged forthwith. *In re Howard*, 536

7. A party in execution who has petitioned and obtained an interim order for protection under the 7 & 8 Vict. c. 96, may be afterwards remanded to his former custody by the commissioner; although the case does not fall within the 24th section of that act. *Ex parte Partington*, 650

8. The proviso at the end of the 28th section is not a general provision, that every one who has been in prison for debt for twelve months shall be discharged; but only limits to that period, the imprisonment after the final order is refused, or indefinitely postponed, or the interim order is not renewed, *Ib.*

9. A prisoner who sues out a writ of habeas corpus ad subjiciendum is not bound by the decision of any one Court; but is entitled to take the opinion of all, as to the propriety of his imprisonment, *Ib.*

10. Where a party is in custody of the keeper of the Queen's Prison, under a judgment of imprisonment on a conviction for a libel, which judgment is afterwards reversed on error; the Court will, on motion, order him to be discharged out of custody. *Thomas Holt v. The Queen*, 774

11. A prisoner in the custody of the keeper of the Queen's prison on criminal process, under a conviction of the Court of Queen's Bench, cannot be charged in execution in a civil suit, by a writ of habeas corpus ad satisfaciendum, issuing out of this Court, even since the pass-

ing of the stat. 5 & 6 V *Gibb v. King*,

12. The Court will not under the 7 & 8 Vict. c. to stay the proceedings in upon a judgment for debt in a former action; although that the sum recovered in the action did not exceed 20*l.* *v. Buxton*,

PROBATE.

See EXECUTOR.

PROFERT.

To assumpsit against a promissory note, defendant (without profert,) an assign his property to trustees for the benefit of creditors, and that the plaintiff be released from his debts. The plea is that there never was a bond of the indenture, and that it did not belong to the defendant; he had no right to it, nor had custody of, nor any power to alter it, and that the same was fully in possession of the trustee, who refused to bring it into Court for no excuse for profert. *H. Warden*,

PROMISSORY NOTE.

See EVIDENCE, 1.

QUEEN'S CHAPLAIN.

See ARREST (PRIVILEGE).

QUEEN'S REMEMBRANCE.

See WITNESS, 5.

QUARTER SESSIONS.

Where the Quarter Sessions appeal on a fresh order of appeal held an entry in their Session of a former order of removal has been quashed on appeal, a

between the parties, and refused to hear evidence to shew that the first order had been quashed by consent, for defect of form and not on the merits; and thereupon quashed the second order; this Court granted a mandamus, commanding them to enter continuances, and hear the appeal. *Regina v. Justices of Flintshire*, 143

QUI TAM.

See COAL ACT.

INDORSEMENT (ON PROCESS), 1.

REGULA GENERALIS.

1. "It is ordered, that for the future it shall not be necessary to have a warrant of attorney to acknowledge satisfaction of a judgment, or a Judge's fiat thereon; but that it shall be requisite only to produce a satisfaction piece similar to that in use in the Court of Queen's Bench; except that in all cases, such satisfaction piece shall be signed by the plaintiff or plaintiffs, or their personal representatives, and such signature or signatures shall be witnessed by a practising attorney of one of the Courts at Westminster, expressly named by him or them, and attending at his or their request, to inform him or them of the nature and effect of such satisfaction piece before the same is signed; and which attorney shall declare himself, in the attestation thereto, to be the attorney for the person or persons so signing the same, and state he is witness as such attorney; but any Judge at Chambers shall have power to make an order dispensing with such signature of the plaintiff or plaintiffs, or their personal representatives, under special circumstances, as he may think right: and that in cases where the satisfaction piece is signed by the personal representative of a deceased plaintiff, he shall prove his representative character in such way as the

master may direct." *Easter Term, 7 Vict.*, 1

2. "That in all actions of assumpsit, debt, or covenant, where the sum recovered, or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.*, without costs; the costs both of the plaintiff and defendant, and as well between attorney and client, as party and party, except as hereinafter excepted, shall be taxed according to the reduced scale hereunto annexed.

"Provided that, in case of a trial before a Judge in one of the superior Courts, or Judge of Assize, if the Judge shall certify on the *postea*, that the cause was proper to be tried before him, and not before a sheriff or Judge of an inferior Court, the costs shall be taxed upon the usual scale.

"Where, in like actions, the sum indorsed on the summons shall be more than 20*l.*, but the plaintiff fails to recover more than that sum, and the Judge does not certify as aforesaid; the plaintiff's costs, as well between party and party, as also between attorney and client, shall be taxed as upon a writ of trial before a Judge of a Court of Record, where attorneys are not allowed to act as advocates, as hereinafter provided for; but the defendant's costs, if any, are to be taxed on the usual scale.

"Provided also, that, in cases triable before the sheriff or Judge of an inferior Court, where the Judge shall refuse to make an order for such trial, the Judge shall, if he shall think fit, direct at the time of such refusal, on what scale the costs of each party shall be taxed; and, in default of such direction, the costs of both parties shall be taxed on the usual scale."

Then follows a scale of the charges to be allowed.

"The foregoing charges are in-

x x x 2

tended as examples. The Masters will exercise their discretion in allowing for attendances, having regard to the expense saved, or favour granted to the party, and to all the circumstances of the case; bearing in mind that for attendances, the allowances are not to be more than half what are allowed, when costs are taxed upon the usual scale. In other cases not hereby provided for, the Masters will conform to the rate of charges hereinbefore inserted, or as near thereto as circumstances will allow." *Directions to the Taxing Officers, in lieu of the Directions of Hilary Vacation, 4 Wm. 4, 1834, so far as relate to the scale of costs in cases where the sum recovered, &c., does not exceed* 90 20*l.*

RAILWAY COMPANY.

See SERVICE OF WRIT, 4.

READINESS AND WILLINGNESS.

See DECLARATION, 7.

RELEASE.

The plaintiff had brought an action against the defendant for the rent of certain premises to which he claimed to be entitled. The executors of T. M., the elder, also claimed the same premises. An interpleader issue was thereupon directed, in which the present plaintiff was made defendant, and the executors of T. M., the elder, were plaintiffs. The issue was found in favour of the executors. Afterwards, by an indenture of lease and release, made between the plaintiff of the first part, the children of T. M., the elder, of the second part, and the executors of T. M., the elder, of the third part; after reciting various transactions, but not alluding to the interpleader issue, the parties thereto of the second and third parts did "acquit, release, and for ever discharge the

REPLEADER.

plaintiff, his heirs, &c., of and for all costs, charges, and expenses which they or either of them might have incurred, in and about the matters therein particularly mentioned and referred to, and also of and from claims and demands, which they said parties thereto of the second and third parts could or might have, claim against the plaintiff for or reason or on account of any transaction which might have hitherto taken place between them, or of either of them." *Held*, that the words did not extend to release the several claim for costs of the interpleader issue, which the executors of T. M., the elder, had against the plaintiff. *Major v. Salisbury*, 7

REMANET.

See JUDGMENT (AS IN CASE OF NONSUIT), 3, 4.
LACHES, 2.

REPLEADER.

To an action of indebitatus assumpsit for money received by the defendants for the use of the plaintiffs and for money due on an account stated, the defendants pleaded that the plaintiffs were co-partners in trade: that the plaintiff Gordon, with the privity of the other plaintiffs employed the defendants to sell certain personal property belonging to the plaintiffs as such co-partners which the defendants agreed to do that, at the time of Gordon's applying to the defendants to sell, and at the time of the sale, and of the making the advances therein mentioned, they believed Gordon to be the sole owner of the property and that he had full authority to dispose of it as his own, they the defendants having no knowledge that the other plaintiffs had any interest in that after they had been so employed to sell the property, and before it

sold, they did, at the request of Gordon, advance to him the sums of money mentioned in the plea, upon an agreement before made between them, that they the defendants might reimburse themselves out of the proceeds of the property to be so sold: and that the advances were made on the faith of such agreement and not otherwise: and that they did afterwards sell the said property for Gordon, "*the other plaintiffs at the said several times aforesaid suffering and permitting the said Gordon to deal therewith as his own sole property, without objection or interference.*" The plea then justified the retaining the money to reimburse themselves for such advances under that agreement. The plaintiffs, in their replication, traversed the allegation in italics. After verdict for the plaintiff for the full amount: *Held*, on motion in arrest of judgment, that the traverse was an immaterial one, and that the proper course was not to arrest the judgment, but to award a repleader.

The rule that a repleader is never awarded in favour of that party who makes the first fault in pleading, only holds where the immaterial issue is found against the party who made the first fault in pleading. *Gordon and Others v. Ellis and Another*, 308

REPLICATION.

See DUPLICITY.

PLEA, 26, 30, 31.

TIME TO REPLY.

1. To a declaration containing two counts on two promissory notes, the defendant pleaded, "that the said notes, and each of them, were and was obtained by fraud:" Replication, "that the said notes were not obtained by fraud:" *Held*, on special demurrer, that the replication was good. *Wood v. Peyton*, 172

2. Trespass for breaking and entering the plaintiff's dwelling-house,

and staying and continuing therein, for a long time, to wit, for the space of four days.

Plea, as to breaking and entering the dwelling-house, and staying therein, as in the declaration mentioned, that the plaintiff sold to one of the defendants certain goods, and that the defendants, in pursuance of a power and authority given by the plaintiff, entered the dwelling-house to remove the goods. The replication traversed the authority, and also new assigned.

Held, on special demurrer, that the replication was not double. *Loweth v. Smith and Another*, 212

3. Trover for certain bales of silk. Plea as to four bales, parcel, &c., that D. A. & Co., were the factors of the plaintiffs, and were intrusted by them with certain dock warrants for the delivery of the said four bales of silk; that D. A. & Co. had applied to the defendant for an advance of money upon the pledge of the said four bales of silk; that it was agreed between the defendant and D. A. & Co., that D. A. & Co. should pledge with the defendant, the said four bales of silk as a security for the money. The plea further alleged the delivery of the dock warrants, the pledging of the said bales of silk, and an advance of money thereupon, and so justified the detaining of the goods. Replication, that D. A. & Co., were not so intrusted with the said dock warrants, &c.; nor did they agree with the defendant for the pledge of the said four bales of silk, &c.: *Held* bad, on special demurrer, for duplicity. *Bonzi and Another v. Stewart*, 258

4. In debt for goods sold, defendant pleaded that H., plaintiff's agent, had procured from defendant, and that plaintiff received, a bill of exchange for and on account of the sum of 59l. 17s. 4d., parcel, &c. Replication, that H. took the bill without plaintiff's consent, knowledge, or authority; that before the commencement of the

suit, and within a reasonable time, to wit, on, &c., plaintiff gave defendant notice thereof; and that afterwards, and within a reasonable time, to wit, on the day and year aforesaid, the bill was returned by the plaintiff to the defendant. Rejoinder, that H. took the bill with the plaintiff's consent, knowledge, and authority: *Held*, that the plaintiff was not entitled to judgment non obstante veredicto; as it did not appear on the face of the replication, that the bill was returned before action brought. *Huxley v. Ball*, 340

5. To trover by the assignees of L. & W., bankrupts, for certain puncheons of brandy, the defendants pleaded, that the bankrupts purchased the brandy of F., and were to pay for the same by a bill of exchange; that defendants, before the bankruptcy, had possession of the brandy as the agents of L. & W.; that the bill being dishonoured, it was agreed that L. and W. should deliver the brandy to F. in satisfaction of the bill. It then averred a re-delivery of the brandy, and acceptance of it by F. in satisfaction, and that before the defendants or F. had any knowledge of the bankruptcy, the brandy became the property of F., by re-delivery by defendants, by authority of L. & W. Replication, that it was not agreed as in the plea mentioned, nor was the brandy re-delivered or accepted in satisfaction, nor did the property in the brandy revert to F. by re-delivery, by authority of L. & W., before they became bankrupt.

Special demurrer for duplicity, alleging that the replication put in issue two particulars, viz. the agreement, and its performance by re-delivery of the brandy: *Held*, that the replication was bad for duplicity.

A party can only avail himself of the grounds of duplicity specially stated. *De Wolf and Another, Assignees, &c., v. Bevan and Another*, 345

6. To a plea of set-off for 400*l.* alleging in the usual form that such sum exceeded the damages sustained by the plaintiff; the latter replied, as to 234*l.* parcel, &c., the Statute of Limitations, and as to the residue of the 400*l.* that he was not indebted, modo et formâ, concluding with a prayer of judgment: *Seemle*, that the replication was bad: also, that, in strictness, a plea of set-off should allege that the defendant's claim equals, not exceeds, that of the plaintiff. *Fairthorne v. Donald*, 675

7. To a plea justifying a trespass, under a writ of test. fieri facias; the plaintiff replied that the said writ was, to wit, on, &c., irregularly sued and prosecuted out of this Court, and was afterwards set aside by an order of a learned Judge, which order was made a rule of Court: *Held*, on special demurrer, that the Court would not intend that it was set aside otherwise than for irregularity; and, therefore, that the replication was good. *Rankin v. De Medina*, 813

8. To an action for work and labour, &c., the defendant pleaded that the action was for work and labour as an attorney, and that no signed bill had been delivered pursuant to the statute: *Held*, on demurrer, that the replication de injuriâ was improper. *Simons v. Lloyd*, 981

RE-SEALING.

Where a cause was set down in the list of undefended causes for trial in the third sittings in Term, and on the defendant's statement that it was a defended cause, was postponed till the sittings after Term; and the plaintiff did not re-seal the record previous to those sittings, although he did so before the day on which the cause actually came on for trial; the Court set aside the verdict which he obtained for irregularity. *King v. Tress*, 73

RESCUE.

See HABEAS CORPUS, 3.

RESTITUTION (WRIT OF).

After judgment in ejectment, and possession delivered, the landlord of premises had been let in to defend the action, on the ground that he had received no notice of the proceedings; and the judgment signed against the casual ejector had been set aside on payment of costs, the lessor of the plaintiff undertaking to try at the next assizes; and in case of his failure to do so, possession to be restored to the landlord. He failed, however, to do so, and judgment of nonsuit was entered up against him. The Court afterwards granted a writ of restitution at the suit of the landlord. *Doe dem. Stratford v. Shail*, 161

RETRAXIT.

After judgment for the plaintiff in the Court of Error, the Court of Queen's Bench allowed the plaintiff to enter a retraxit for the defendant of a plea, which involved an issue in fact, and which had been left on the record, and carried up in the transcript, for the sole purpose of explaining the record, which would have otherwise been unintelligible. *Herbert v. Sayer*, 49, 57, 64

REVISING BARRISTER.

1. The Court has no power to remit to the revising barrister the case drawn up by him, in order that a fact, deemed material by one of the parties to the appeal, but omitted by the barrister on the ground of immateriality, may be inserted; the finding of the barrister being conclusive upon the question of what the material facts are. *Hinton, Appellant, and The Town Clerk of Wenlock, Respondent*, 598
2. The Court refused to allow an appeal against the decision of a re-

vising barrister to be entered, where the barrister, after consenting to grant a case, and expressing his approval of the points raised in a statement of facts, returned the statement to the parties to draw up in another form; and died without signing the case so drawn up. *Nettleton, Appellant, and Burrell, Respondent*, 598

REVOCATION (OF SUBMISSION).

See ARBITRATION, 12.

RIOT.

See HABEAS CORPUS, 3.

RULE (SERVICE OF).

See ARBITRATION, 7.

SCOTLAND.

See WITNESS, 1.

SECOND APPLICATION ON THE SAME GROUND.

See OUTLAWRY.

SECURITY FOR COSTS, 1.

SECURITY FOR COSTS.

1. An affidavit in support of a rule for security for costs, stating that the plaintiff resides out of the jurisdiction of the Court, *as this deponent is informed and believes*, is sufficient: and such application being discharged on account of a defective affidavit, cannot afterwards be renewed upon an amended affidavit. *Joynes v. Collinson*, 449
2. A party, made defendant under an interpleader rule, is entitled to demand security for costs from a plaintiff residing beyond the jurisdiction of the Court. *Benazech v. Bessett*, 801
3. In an action on a bond, after demand of oyer, and before plea

pleaded, the defendant may compel a plaintiff, residing abroad, to give security for costs. *West v. Cook*, 834

4. Where on the trial of an action of ejectment a verdict was taken, subject to a special case, and before the terms of it were settled, the lessor of the plaintiff died: *Held*, that this formed no ground for an application for setting aside the verdict, or staying proceedings in the action; but that the Court would compel the plaintiff to find security for costs. *Doe on the demise of the Right Honourable George Earl of Egremont v. Mary Stephens*, 993

SEDUCTION.

In an action on the case for the seduction of a daughter, the declaration must allege a consequent loss of service.

The plaintiff declared in case for the seduction of his daughter, that being a poor person, and unable to maintain herself except by her work, the defendant debauched her, and she thereby became sick and unable to work; whereby the plaintiff was forced and obliged, and did necessarily pay sums of money for her maintenance, and in and about her delivery, and curing her of her illness: *Held*, on motion in arrest of judgment, after verdict for the plaintiff, that the declaration disclosed no sufficient cause of action. *Grinnell v. Wells*, 610

SERVICE (OF RULE.)

See ARBITRATION, 7.

Service of a rule nisi to compute upon a clerk of the defendant's, at his counting-house, is not sufficient. *Warwick v. Bacon*, 596

SERVICE (OF WRIT.)

1. Where the party attempting to serve a writ of summons went to the

defendant's house, and seeing him standing at a closed window, on the ground floor, told him, in an audible voice, the purpose for which he came, and threw a copy of the writ down his sight, and in the presence of his wife, who had come out of the house and who had denied that he was home, and left it lying there, in the defendant's garden: *Held*, on motion to set aside the appearance entered for the defendant, and all subsequent proceedings, that the above was not sufficient service. *Heath v. White*, 4

2. The affidavit in support of motion to set aside process served in a wrong county, stated that the process had been served more than two hundred yards from the boundaries of the proper county: *Held*, sufficient without adding that there was no dispute as to boundaries. *Martin Granger*, 26

3. A writ of summons was left at the defendant's residence, in which it was described as of "Wilson Street Finsbury, in the city of London." Upon affidavit that Wilson Street was in the county of Middlesex, and not in the city of London; the Court set aside the writ; notwithstanding that the defendant had not been personally served. *King v. Hopkins*, 68

4. A statute incorporating a company for making a railway in Ireland enacted, that personal service of process upon the clerk or secretary, leaving the same at the office of the company, or of a secretary or clerk, delivering the same to an inmate of such office, or at the last or usual place of abode of the secretary or clerk or in case the same respectively should not be found or known, then personal service upon any agent or officer of the company, "or on any one directed of the company," &c. "should be deemed good and sufficient service." *Held*, that personal service of a writ of summons upon a director in England was null and void. *Evans*

The Dublin and Drogheda Railway Company, 865

SET OFF.

See PLEA, 24.

REPLICATION, 6.

SETTING ASIDE JUDGMENT.

A rule to set aside a judgment irregularly signed, and to sign judgment anew, at the instance of the party signing it, is only a rule nisi in the first instance. *Bennett v. Simmons,* 98

SEVERAL DEFENDANTS.

Where in an action of trespass, at the close of the plaintiff's case, there is no evidence against one of several defendants, it is in the Judge's discretion whether he will direct a verdict of acquittal to be entered as against him; and where he had refused to do so, and the jury had subsequently found a verdict for the plaintiff against all the defendants, the Court declined to grant a rule for a new trial. *White v. Hill and Others,* 537

SHERIFF.

See DECLARATION, 5.

HABEAS CORPUS, 2.

POUNDAGE.

In trover against a sheriff and two bailiffs, the bailiffs pleaded separately, a justification under process issued out of the County Court. New assignment thereto, alleging the conversation to be the retainer of possession by the bailiffs after the issue of a supersedeas by the sheriff, and notice thereof to them. Plea to the new assignment, not guilty. The bailiffs were specially appointed, and the sheriff took an indemnity from the plaintiff's attorney. A verdict having passed against the sheriff at the trial: *Held,* on motion to enter the verdict

in his favour, that he was not liable for the wrongful acts of his bailiffs after the issuing of the supersedeas.

Semble, per *Cresswell, J.*, that the sheriff is a judicial officer, with respect to process issued out of the County Court, and, therefore, not liable for the acts of his bailiffs; and also that the new assignment was ill pleaded, as shewing on *evidence* of a conversation. *Brown v. Copley and Others,* 332

SHERIFF, (RETURN OF.)

See INTERPLEADER, 2.

1. A writ of *fi. fa.* having been lodged with the sheriff after a debtor had been declared bankrupt and assignees appointed, the sheriff returned "*nulla bona.*" Before the return was made, the Court of Review had ordered that the fiat be annulled, if the Lord Chancellor should think fit; and after the return, the Lord Chancellor made an order accordingly: *Held,* that the return was not false; since the annulling of the fiat had not a retrospective effect; and that even if it had, the sheriff being a public officer, and having made the only return which he could at the time have made, ought to be protected. *Smallcombe v. Olivier,* 217

2. A return to a *fi. fa.* stated that the sheriff had paid a sum "for rent due for the premises whereon the said goods and chattels were taken in execution:" but without stating that the rent was due at the time of the seizure. On motion to quash the return, *Held,* sufficient. *Reynolds v. Barford,* 327

3. The sheriff's return to an *elegit* need not set out the lands by metes and bounds; it is sufficient to describe them by their names. *Doe dem. Roberts v. Parry,* 430

4. To a writ of *allocatur* exigent the sheriff returned, that at his County Court, held at, &c., in and for the county of, &c., on, &c., the said A. W.

was the fifth time demanded and did not appear; and that "because her Majesty's coroners of the said county were and each of them was absent on the said fifth demand so made as aforesaid, judgment of outlawry against the said Augustus Wedderburn could not be pronounced, &c. *Held*, that the return was bad. *M'Taggart v. Wedderburn*, 576

SHERIFFS' OFFICER.

See HABEAS CORPUS, 2.

SIMILITER.

See EJECTMENT, 3,
WRIT OF TRIAL, 4.

When the plaintiff delivers the issue, adding the similiter for the defendant, and the defendant gives notice that he has struck out the similiter, but does not deliver any rejoinder or demurrer within the four days limited for that purpose; the proper course for the plaintiff to pursue is to sign judgment for want of a rejoinder: and where he did not do so, but treated the notice as nugatory, and proceeded to trial and judgment, the Court made absolute a rule to set aside the proceedings for irregularity. *Twycross v. King*, 534

SMALL DEBTOR.

1. On a motion to discharge the defendant out of custody, under the 48 Geo. 3, c. 123, sec. 1, where the plaintiff's residence, and that of his attorney were unknown; a notice of the motion left with the successors in business of the attorney, who stated that they were concerned in other business for the plaintiff, and that they would oppose the defendant's discharge, was held sufficient; and a rule nisi was granted to be served upon them. *Jones v. Boddington*, 30

2. The statute 48 Geo. 3, c. 123,

STAYING PROCEEDING

sec. 1, applies to a defendant i today for the costs and damage action of ejectment. *Doe dem. v. Price*,

SPECIAL CASE.

In order to enter a special argument, the leave of the must be previously obtained. *Kennet and Avon Navigation pany v. Great Western R Company*,

STATUTE OF FRAUD

See ATTORNEY (UNDERTAKING

STATUTE OF LIMITATI

See LIMITATIONS, (STATUTE

STAY OF PROCEEDING

In ejectment, a party claim be landlord took out a summo particulars of the premises, and summons for time to appear and An order was made for the deliv particulars, but containing no for a stay of proceedings; o other summons an order was ma a week's time to plead: *Held* the order for particulars did not o as a stay of proceedings. *Doe Roberts and Others v. Roe*,

STAYING PROCEEDING

See NUL TIEL RECORD.
SUMMONS (WRIT OF),

1. On a motion to stay pro ings in an action on a judgme the ground that it had been s against good faith, it appeared, similar affidavits had been previ used, and the same objection su fully urged, on a motion to set a writ of fieri facias issued o same judgment. The Court g a rule to stay proceedings i

action, but without costs, as the defendants ought to have included the judgment in their former motion. *Philpot v. Thompson and Another*, 18

2. Where A. the defendant in ejectment for land in the county of C. had attorned and paid rent to B., who recovered; but did not pay costs; and A. afterwards succeeded in a second action brought by B. upon the same title, for lands in the county of G.; the costs of which had also not been paid: the Court would not stay proceedings in a subsequent action of ejectment brought by A. against the heirs of B., for the land in the county of C.; till the costs of the former ejectment were paid; unless B.'s heir would undertake not to rely on his ancestor's title, save by estoppel only. *Doe dem. Evans v. T. B. Snead, J. O. Brown, and Caroline Maria, his Wife*, 119

3. The plaintiffs recovered a verdict in an action of assumpsit on two bills of exchange for 68*l.* 6*s.* for damages and costs. After a fiat in bankruptcy had issued against the defendant, they signed judgment. Afterwards they proved under the commission for the amount of the bills of exchange, the commissioners refusing to allow them to prove for the costs. The bankrupt never obtained his certificate, nor was any dividend paid under the commission. The plaintiffs subsequently sued out a writ of scire facias to revive the judgment, solely with the view of recovering the costs. The Court granted a rule to stay proceedings on the scire facias. *Woodward and Another v. Meredith*, 135

4. The plaintiff had made and filed an affidavit of debt against the defendant; and afterwards served the defendant with a notice, under the statute, requiring immediate payment; and also at the same time, with a writ of summons in an action, indorsed for the same debt, with 2*l.* 2*s.* costs. The defendant afterwards paid the

debt, but declined to pay the 2*l.* 2*s.* for costs. The Court refused to stay proceedings in the action. *Covington v. Hogarth*, 619

5. Where an attorney brings an action in the name of a person without his authority, the Court will stay the proceedings, on the motion of the defendant, and make the attorney pay the costs. *Hubbart v. Phillips*, 707

SUBPŒNA.

See WITNESS, 2.

1. A writ of subpœna, bearing teste out of Term, is void. *Edgell v. Curling*, 600

2. In order to obtain an attachment against a witness, the original writ of subpœna must be shewn at the time of the service of the copy.

Where the witness, a managing clerk to an attorney, was served with a subpœna in Court about an hour before the trial came on, and whilst he was attending to the winding up of a cause in which he was engaged, and which stood next but one on the list before the cause in question. *Semble*, that this was not a sufficient service to warrant the granting an attachment. *Pitcher v. King*, 755

SUBPŒNA DUCES TECUM.

See ATTACHMENT, 1.

SUPERSEDEAS.

See SHERIFF.

SUMMONS (WRIT OF).

See AMENDMENT.

1. The form of the writ of summons in Schedule I. of 2 Wm. 4, c. 39, must be strictly complied with; therefore, the Court set aside the copy and service of a writ, which omitted to mention the Court, in which an appearance was to be entered; though tested in

the name of the Chief Baron. In the affidavit in support of the application, deponent described his residence differently from that in the writ, and made no allegation that he was the defendant in the cause.

Held, sufficient, it appearing that he was the party served. *Stevenson v. Thorne*, 230

2. A writ of summons was served on the defendant, with an indorsement, stating that on payment of a certain sum for debt and costs, within four days, proceedings would be stayed. After the four days had expired, the defendant's wife paid the amount to the clerk of the plaintiff's attorney, in the absence of his master, and obtained from him a receipt, which the attorney, upon his return, disavowed; and he proceeded with the action, but did not return the money. The Court, under these circumstances, refused a rule to rescind a Judge's order, which had been granted, for a stay of the proceedings in the action. *Hodding v. Stuchfield*. 596

3. A writ of summons served in the county of M., but describing the defendant as "of W., in the county of S., but now in the county of M.," is irregular. *Downes v. Garbett*, 944

TAXATION.

See AFFIDAVIT ENTITLING.
MESNE PROFITS.
PLEA, 11.

1. An attorney had delivered a bill in 1840, and continued to act as attorney afterwards. In 1842, the client being pressed for payment, demanded a statement of his account, and gave two joint notes of hand, which the attorney swore he received in "lieu of cash." The attorney, after these notes became due and were paid, delivered two other bills, comprising some of the items, and extending over a portion of the time included in the first; *Held*, on motion to refer the bills for tax-

ation, that the three bills constituting, in point of bill; "the payment of an within the 41st section Vict. c. 73, so as to preclude after the lapse of twelve months be a payment after the date of the whole of such bills.

Semble, the mere delivery of exchange or promissory a payment within that section if the bill of exchange or note were dishonoured; the client would remain liable for the attorney's bill. *In re Pe*

2. Where a cause, with in difference, was referred to arbitration, the costs of the cause reference to abide the result; the costs of a cross action by parties, to be also in the hands of the arbitrator, but no power to enter up judgment for costs awarded; and the arbitrator that a sum of 17l. 3s. was plaintiff, and that nothing with regard to any other difference between them, a costs of the cross action borne equally between them; and it appeared that the defendant successfully resisted an application to try the cross action before *Held*, the Master having plaintiff's costs on the bill; that the Court would order of his taxation. *Elleman v.*

3. An action of trespass and battery was brought by father and son. The son, minor, appeared by his father, and pleaded not guilty; the father appeared by attorney, and pleaded two special pleas. Judgment having passed against the father in favour of the son; upon application to review the taxation of costs, it appeared that the Master had taxed the son only a guinea for his attorney's expenses for att-

trial at Liverpool, and only the expenses of three sheets of the brief, the same brief including the defence of both the defendants, and the Master had refused to allow any mileage for the attorney's expenses in travelling from Richmond in Yorkshire, where the assault took place, and near to which he resided, to Liverpool. The Master had also refused to allow the moiety of a witness's expenses, who was called for the joint defence, as well as incidentally for that of the son: the Court ordered a review of the taxation, except as to the expenses of the brief. *Alderson v. Thomas Waistell and Henry Waistell*, 127

4. The copy of an affidavit of increase delivered under Reg., M. T., 1 Wm. 4, r. 10, must contain a copy of the jurat also; the words "Sworn, &c.," are insufficient. But the above omission is no ground for setting aside the judgment, but only for reviewing the taxation of costs. *Wheldal v. The Eastern Counties Railway Company*, 246

5. The Master having refused on taxation to allow the costs of examining a witness upon interrogatories; the interrogatories not having been offered in evidence at the trial: *Held*, no ground for a review of the taxation. *Curling and Others v. Robertson*, 307

6. The "directions to the taxing officers" of Trin. Term, 7 Vict., do not prevent the Master from allowing an attorney, as against his client, the costs of counsel, retained by express direction of the client, and with full knowledge that such costs could not be recovered against the opposite party. *In re J. C. Smith*, 376

7. The "special circumstances," under which a Judge may, by the 6 & 7 Vict. c. 73, s. 37, refer an attorney's bill for taxation, after verdict, must, in general, be circumstances newly come to the knowledge of the party, and upon learning which

he must apply promptly to the Court. *In re Whicher, and between William Whicher and James Thomas*, 407

8. A defendant pleaded to a declaration several pleas, upon which issues were joined, and also a plea to the whole cause of action, to which the plaintiff demurred, and had judgment. The plaintiff afterwards discontinued. On taxation of costs, it appeared, that the costs to which the plaintiff was entitled on the demurrer, exceeded the costs which he had to pay on the discontinuance. The Master, therefore, deducted the latter from the former: *Held*, on motion to review the taxation, that the defendant might enter up judgment of discontinuance, and bring a writ of error; and that if he intended to do so, the costs should be taxed separately; otherwise that the taxation was correct. *The Mayor, &c. of Macclesfield v. Gee*, 418

9. A cause being referred to arbitration, an attorney of this Court was retained by the defendant's attorney, to conduct the defence before the arbitrator. He afterwards delivered a signed bill to the defendant's attorney, in which he charged for "journey and tavern bill, attending and advocating four days as per terms, 12l. 12s.; posting and travelling expenses as per agreement, 3l. 4s.:" *Held*, that this was not a taxable bill. *In re Simons*, 500

10. A Court of common law has no authority under stat. 6 & 7 Vict. c. 73, s. 37, to order a bill to be referred to the Master for taxation, where none of the charges are for business done in a Court of law; although an action at law has been brought to recover the amount of the bill. *Bush and Another v. Sayer, and In re Bush and Mullens, Gents. two, &c.*, 602

11. In trover, the plea of not guilty was found for the defendants, and the other issues for the plaintiffs. The defendants signed judgment, and

taxed their costs, which were paid. The Court refused to set aside an order, which the plaintiffs obtained, nearly a year afterwards, to tax the costs upon the issues found in their favour. *Watson and Others, Assignees of Fawcett v. Boyes and Another*, 663

12. The declaration in an action on the case contained three counts; to which the defendant had pleaded not guilty, and to each of the counts, various special pleas, which went to the whole cause of action in each count. The action and the damages sought thereby to be recovered, and all matters in dispute therein, were referred to arbitration; the costs of the action, and of the reference and award, to abide the event of the award. The arbitrator awarded that the plaintiff had good cause of action in respect of the second count, and was entitled to recover a certain sum for damages on that count; but that he had no cause of action in respect of the first and third counts. The Court ordered the Master to tax the plaintiff his costs in the cause; upon the plaintiff's allowing the costs of the first and third counts, and of the issues relating to the first and third counts, to be taxed for the defendant. *Williamson v. Locke*, 782

13. To an action of trespass for assault and false imprisonment, one of the defendants pleaded the general issue, and a plea of justification under legal process. The plaintiff replied that the defendant broke open the outer door; upon which issue was joined. The jury found a verdict for the defendants on the first issue, and for the plaintiff on the second: *Held*, on motion to review the Master's taxation, that the defendant was entitled to the general costs in the cause. *Newton v. Holford and Others*, 826

14. A bill for agency business is not taxable under the 6 & 7 Vict.

c. 73. *In re Gedge, and in a cause between Gedge and Elgie*, 911

15. Where it appeared that the costs of certain witnesses sworn to have been paid in an affidavit of increase, and allowed in the Master's allocatur, had not in point of fact been paid till after the allocatur was granted; the Court ordered the plaintiff to refund such sums to the defendant; although no intention of fraud was imputed to the plaintiff. *Trent v. Harrison*, 941

16. Where the plaintiff, in an action of assumpsit for unliquidated damages, had recovered a verdict for 20*l.*, and the Master had taxed his costs on the higher scale; the Court set aside an order of a Judge, directing a review of the taxation. *Walther v. Mess*, 961

17. Where an order to refer an attorney's bill to taxation, had been obtained before the passing of the 6 & 7 Vict. c. 73, and the Master's allocatur had since been made, by which he taxed off less than a sixth of the bill: *Held*, that the case came within the exceptive clause in the statute, and that the Court had power to make an order on the client to pay the costs of the taxation. *Doe dem. Potts v. Jinders*, 986

TENANT IN COMMON.

In an action by a tenant in common against his companion, under the 4 Ann. c. 16, s. 27, the declaration must allege that the defendant has received more than his share of the rent. *Sturton v. Richardson*, 181

TENDER.

See DECLARATION, 7.

TERM.

See ARBITRATION, 3.
SUBPENA.

UNIFORMITY, &c.

TESTE OF WRIT.

See SUBPENA.

TIME TO REPLY.

It is neither usual nor reasonable, on granting a plaintiff time to reply, to impose on him the terms of replying issuably. *Crutchley v. The London and Birmingham Railway Company*, 102

TITHE COMMUTATION ACT.

See COSTS, 4.

TORT.

See INSOLVENT.

TRESPASS.

See PAYMENT INTO COURT.
PLEA, 9.
PROPERTY.

TROVER.

See SHERIFF.

The assignees of a bankrupt cannot maintain trover against an execution creditor who has not interfered in the sale of the bankrupt's goods. He is only liable in an action for money had and received. *Whitmore and Another, Assignees of Loughton, a Bankrupt, v. Greene, Esq., and Cottam*, 174

TRUSTEE.

See MONEY HAD AND RECEIVED.

UNCERTAINTY.

See PLEA, 16.

UNIFORMITY OF PROCESS ACT.

See ATTORNEY, (PRIVILEGE OF).

VENIRE FACIAS. 1055

UNLIQUIDATED DAMAGES.

See WRIT OF TRIAL, 1.

USE AND OCCUPATION.

See PLEA, 33.
VENUE.

USURY.

See ESTOPPEL, 1.

VACATION.

See COUNSEL (HEARING).

VARIANCE.

See DECLARATION, 4.
ERROR, 4.
EVIDENCE, 2.
LACHES, 2.
NUL TIEL RECORD.

Where the defendant was described in a writ of capias, issued under the 1 & 2 Vict. c. 110, s. 3, as "Mortlock," and in the copy served upon him as "Mortlake," the Court refused to discharge him out of custody, on the ground of the variance. *Macdonald v. Mortlock*. 963

VENDOR AND PURCHASER.

A purchaser at an auction can, before payment, make a complete bargain and sale of the article which he has bought to a third party; so as to maintain an action for goods bargained and sold. *Scott v. England*, 520

VENIRE FACIAS.

Where judgment had been given for the plaintiff on certain issues in law, and, on the subsequent trial of the issues in fact, the plaintiff obtained a verdict; the Court refused to set aside the trial, on the ground

that the venire juratores was defective, in not being tam ad triandum quam ad inquirendum. *Wood v. Peyton*, 441

VENUE.

See INDICTMENT.

PENAL ACTION.

The defendant may change the venue, on the usual affidavit, in an action of debt for use and occupation. *Herring v. Watts*, 609

VERDICT (DISTRIBUTIVE.)

See EJECTMENT, 4.

VERIFICATION.

See PLEA, 34.

WAIVER.

See ARBITRATION, 19.

CERTIORARI, 2.

ESTOPPEL, 3.

1. In trespass for breaking and entering the plaintiff's dwelling-house, &c., defendants justified the breaking and entering, and forcing open the inner doors and searching the rooms of the plaintiff, as officers of the sheriff, under a ca. sa. against C. F.; that for six months before the trespasses, C. F. had resided in the plaintiff's house; and that at the time of the trespasses, the defendants had good ground to suspect and believe, from the information of the attorney who sued out the writ, that C. F. was then in the house. At the trial, the learned Judge expressed his opinion that the plea afforded a defence; but said he would direct the jury to assess damages, in case the Court should be of a different opinion. The jury assessed the damages at one farthing.

Held, that the plea afforded no defence; but that neither party having objected to the contingent assessment of damages, the plaintiff was not en-

WARRANT OF ATTORNEY.

titled to a new trial, on the ground of misdirection. *Morrish v. M. and Another*.

2. Defendant being under a writ to plead, delivered a writ to plead a rule to reply, and the plaintiff obtained a week's time to reply the end of which, instead of replying, he signed judgment, on the ground that one of the pleas was not issued. *Held*, that the plaintiff had waived the objection to the plea, by obtaining time to reply. *Stead v. Carey*.

WARRANT.

Where a warrant of commitment under the 6 Geo. 3, c. 25, s. 4 Geo. 4, c. 34, s. 3, does not recite a conviction, it must appear on the face of it, that the examination, on which the magistrate has proceeded, was taken on oath, and taken in the presence of the prisoner. In *re Gray and others*,

WARRANTY.

See COUNTS (JOINDER OF).

WARRANT OF ATTORNEY.

1. On a motion for leave to set aside judgment on an old warrant of attorney, the Court will permit an affidavit of its due execution, made and used more than a year ago, in an unsuccessful application of a similar nature, to be used in support of the motion. *O'Neill v. Coghlan*,

2. The London agent of the plaintiff's attorney, whose name has been suggested by plaintiff's attorney, is not a good attesting witness to the execution of a warrant of attorney on behalf of the defendant, under the 1 & 2 Geo. 4, c. 110, s. 9, although the defendant, of his free choice, adopted him as his attorney; where it appears, that he was acting also as agent for plaintiff's attorney in the transaction. *Pryor and Another v. Swaine*,

3. A warrant of attorney, executed by defendant in 1818, authorized judgment to be entered up against him "as of Trinity Term last, Michaelmas Term next, or any other subsequent Term." On the 30th of November, 1843, the plaintiff entered up judgment, and the writ of fi. fa. thereon was executed on the 6th of December. On the 18th of December, the defendant became bankrupt, and assignees were appointed on the 3rd of January, 1844. The assignees knew, on the 16th of January, that the judgment had been entered up on a warrant of attorney, but they did not apply to set aside the judgment and execution till the 15th of April: *Held*, that the application was made too late.

Semble, that the above judgment was irregularly signed. *Bate v. Lawrence*, 83

4. On a warrant of attorney, dated the 30th of April, 1841, and given to secure an annuity, authorizing a judgment "as of this present Easter Term, Trinity Term next, or any other subsequent Term:" the plaintiffs, had signed judgment on the 7th of December following, "as of Michaelmas Term, 1841;" and issued a ca. sa. on the following day. One of the defendants applied, in Hilary Term, 1842, to set aside the annuity deed, the warrant of attorney, the judgment, and subsequent proceedings, on the ground of a defect in the memorial of the annuity deed. Another writ of ca. sa. having been issued on the 18th of May, 1844, under which the same defendant had been taken in custody: *Held*, that it was too late in Trinity Term, 1844, to object that the judgment had been improperly signed; as he should have availed himself of that ground, when before the Court, on the former application. *Anderson and Another v. F. Harrison and Another*, 91

5. Where a warrant of attorney

was directed to J. W. C. and H. J., "attorneys of his Majesty's Court of King's Bench," authorizing them "to appear for the defendant, as of," &c., and "there to receive a declaration for him;" and thereupon, "to suffer judgment, &c., to be forthwith entered up against him of record of the said Court;" and the defeazance provided that it should not be necessary to revive the judgment after the lapse of a year and a day, "any rule, &c., in the said Court of King's Bench, to the contrary notwithstanding:" *Held*, that an appearance was properly entered for the defendant in the Court of King's Bench, no other Court being mentioned in the warrant of attorney. *Harris v. Peck*, 106

6. Where a warrant of attorney authorized an appearance to be entered in an action for 200*l.*, and judgment to be suffered in the same action for the said, (leaving a blank); and an appearance was accordingly entered, and judgment signed for 200*l.*, together with the costs of the suit, amounting to 3*l.* 10*s.*; and afterwards a scire facias was sued out to revive the judgment, and judgment obtained thereon by default, and the defendant, who was in custody, was charged in execution, under a habeas corpus ad satisfaciendum at the suit of the plaintiff: *Held*, on motion to set aside the judgment and to discharge the defendant out of custody; that the judgment for costs was not authorized by the warrant of attorney, and was therefore a nullity, and must be set aside in toto; and that the Court could not amend it, by striking out that part which referred to the costs, without a rule to amend. *Page v. South*, 108

7. An execution founded on a warrant of attorney, and complete by sale, prior to the issuing of a fiat, is protected by the 2 & 3 Vict. c. 29, notwithstanding the creditor before

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the sale had notice of an act of bankruptcy. *Whitmore and Another, Assignees of Loughton, a Bankrupt, v. Greene, Esq. and Cottam*, 174

8. A warrant of attorney executed abroad, must be attested by an attorney, in pursuance of 1 & 2 Vict. c. 110, sec. 9. *Davis v. Trevanion*, 743

9. An outlaw may claim the protection of the Court to set aside irregular proceedings which have been taken against him; although he cannot put the law in motion for his benefit, without first reversing his outlawry.

The Court will, therefore, set aside a judgment on a warrant of attorney, and a scire facias to revive that judgment, on the ground that the warrant of attorney has not been duly attested; although the defendant be an outlaw. *Ib.*

10. An insolvent, after an adjudication of final discharge at the expiration of a certain period, was arrested during that period by the creditors, at whose suit he was remanded, under a *capias ad respondendum*, issued by virtue of the 85th section, of 1 & 2 Vict. c. 110. He, thereupon, in order to obtain his release from custody, executed a warrant of attorney for the debt, and paid a sum of money by way of instalment, and another sum for the costs of preparing the warrant of attorney. The Court ordered the warrant of attorney to be set aside, and the sums of money so paid to be refunded. *Ex parte Hart*, 778

11. A defendant, intending to execute a warrant of attorney, went to the office of the attorney for the plaintiff, where he found another attorney, W. J. M., (the brother of the plaintiff's attorney.) The plaintiff's attorney then read over a form of words (contained in the warrant of attorney) which the defendant repeated after him, stating that he,

defendant, had nominated W. as his attorney: *Held*, that this was an express naming of an attorney for the defendant, within the meaning of the statute, 1 & 2 Vict. c. 110, sec. 9. *Walton v. Chandler*,

WITNESS.

1. The 6 & 7 Vict. c. 82, extends to a commission from the Scotch Courts, for the production of documents; and a rule to compel a party to produce the documents required, is only a rule nisi in the first instance. *Kay and Oth Gennell and Others*,

2. On a motion for an attachment against a witness for not obeying a subpoena, it is not necessary that the witness should have been called by the Court upon his subpoena, if it can appear from the affidavits that the witness was not in attendance at the trial. *Goff v. Mills*,

3. Nor is it any answer to a motion for an attachment that the witness tendered by way of expenses is insufficient; if the witness makes no objection on that ground, but offers to pay his own expenses.

4. The witness, a servant in the employment of a maltster, at the time in question, was employed in washing green malt, with strict orders not to leave his master's house at night or day, otherwise considerable damage might have been occasioned. *Held*, that this formed no sufficient ground of excuse for omitting to attend at the trial; although the service of the subpoena was so late as not to afford the witness a reasonable time for communicating with his master.

5. In an information by the Attorney General for a breach of the revenue laws, the Court granted a rule to examine a witness for the Crown before the Queen's remembrancer; but refused to order it

the examination should be received in evidence at the trial. *The Attorney General v. Reilly*, 690

WORK AND LABOUR.

See INTERPLEADER, 1.
ISSUABLE PLEA, 1.

WRIT OF RIGHT.

1. A writ of right by journeys accounts sued out after the time allowed by stat. 3 & 4 Wm. 4, c. 27, s. 36, for suing out original writs of right, is a nullity; being a new writ, and not a continuance of a former one. *Davies, Demandant, v. Lowndes, Tenant*, 272

2. But the Court refused to set aside, on motion, a writ so issued, and the subsequent proceedings; the objection to the writ, &c., appearing on the record, *Ib.*

3. In an action on a writ of right, the Court will not allow the general mise to be pleaded in conjunction with other matters, under stat. 4 & 5 Anne, c. 16, s. 4, *Ib.*

WRIT OF TRIAL.

1. In an action of indebitatus assumpsit, for "arrears of salary due to plaintiff as chorus master" at a theatre, and for "salary due to plaintiff for his services as a performer," at the same theatre, and on an account stated; it appeared, that the action was brought for arrears of salary, from which defendant claimed to make certain deductions (the plaintiff denying his right to do so), and for a week's salary consequent on a dismissal without a week's notice, and for certain performances as an actor in certain parts undertaken at a short notice, and respecting which there was no agreement as to the rate of remuneration. The particulars of demand claimed a sum of

19l. 18s. 6d., and consisted of various items of the description above mentioned, but contained no claim for "unliquidated damages:" *Held*, that this was not an action for unliquidated damages, and therefore might be tried before the sheriff, pursuant to the 3 & 4 Wm. 4, c. 42, s. 17. *Hatton v. Macready*, 5

2. Upon the return of a writ of trial, the plaintiff may tax his costs and sign final judgment; without waiting, as in other cases, until the expiration of four days. *Gill v. Rushworth*, 416

3. Where in an action to be tried before the sheriff, two issues had been joined, and the plaintiff made up the award of the writ of trial, with a venire to try the issue between the parties: *Held*, that the issue thus delivered was defective, and that the defendant might come to the Court to have it amended, at the plaintiff's cost; and that he was not bound to make the application at Chambers, in Term time.

Held, also, that the above defect was no ground for setting aside the notice of trial,

Semble, where the plaintiff adds the similiter for the defendant, and delivers the issue with an award of a writ of trial, leaving blanks for the dates of the teste and return of the writ, that the issue thus delivered is irregular. *Dennett v. Hardy*, 484

4. Also that where it is for the plaintiff to add the similiter for the defendant, the Judge's order for the writ of trial should first be obtained, before the plaintiff delivers the issue, which may then contain the proper date, *Ib.*

5. Where a new trial is moved for as against evidence, in a case which has been tried before the under-sheriff, under the 3 & 4 Wm. 4, c. 42, s. 17, and where no counsel were present at the trial, it is not

necessary that there should be an affidavit stating the ground of the motion. *Henning v. Ackerman*, 733

6. Where the plaintiff in issuing a writ of trial, on the 3rd of January, had made it returnable on the first day of Easter Term following, and the trial was had on the 16th of January, and a verdict returned for the defendant; the Court, on the motion of the defendant, ordered the sheriff

to return the writ forthwith. *Bil v. Railton*,

7. Where the amount indorsed on a writ of summons exceeds £100, a Judge has no jurisdiction to order a writ of trial: notwithstanding sum claimed by the particular demand is less than 20*l.* *Gosli v. Cotterell*,

8. In such cases the Judges have resolved not to amend the writ,

THE END.

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